No. 14-1143

Title:	Chadrin Lee Mullenix, Petitioner v. Beatrice Luna, Individually and as Representative of the Estate of Israel Leija, Jr., et al.
Docketed:	March 20, 2015
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(13-10899)
Decision Date:	December 19, 2014

—Date—	------Proceedings and Orders----------
Mar 19 2015	Petition for a writ of certiorari filed. (Response due April 20, 2015)
Mar 27 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Apr 6 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Apr 8 2015	Order extending time to file response to petition to and including May 20, 2015.
Apr 20 2015	Brief amici curiae of Texas Municipal League, et al. filed.
Apr 20 2015	Brief amici curiae of National Association of Police Organizations, et al. filed.
May 12 2015	Order further extending time to file response to petition to and including June 5, 2015.
Jun 4 2015	Letter dated June 4, 2015, received from counsel for petitioner waiving 14-day waiting period for the filing of a reply brief pursuant to Rule 15.5.
Jun 5 2015	Brief of respondents Beatrice Luna, Individually and as Representative of the Estate of Israel Leija, Jr., et al. in opposition filed.
Jun 9 2015	DISTRIBUTED for Conference of June 25, 2015.
Jun 11 2015	Reply of petitioner Chadrin Lee Mullenix filed. (Distributed)
Jun 25 2015	DISTRIBUTED for Conference of June 29, 2015.
Sep 21 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 5 2015	DISTRIBUTED for Conference of October 9, 2015.
Oct 13 2015	DISTRIBUTED for Conference of October 16, 2015.
Oct 26 2015	DISTRIBUTED for Conference of October 30, 2015.
Nov 2 2015	DISTRIBUTED for Conference of November 6, 2015.
Nov 9 2015	Petition GRANTED. Judgment REVERSED Justice Scalia, concurring in the judgment. Justice Sotomayor, dissenting. Opinion per curiam. (Detached Opinion)

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14-1143

No.

In the Supreme Court of the United States

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY, PETITIONER

v.

BEATRICE LUNA, INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.;
CHRISTINA MARIE FLORES, AS NEXT FRIEND OF
J.L. AND J.L., MINOR CHILDREN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rather than submit to arrest under a lawfully issued warrant, a suspect led police on an extended nighttime chase at speeds up to 110 miles per hour, during which he told a police dispatcher that he had a gun and would shoot police officers. The defendant officer fired his service rifle from an overpass in an attempt to disable the suspect's vehicle before it reached an officer stationed beneath the overpass and other officers further along the road. The questions presented are:

(1) Viewing the facts from the officer's perspective at the time of the incident, did he act reasonably, under the Fourth Amendment, when an officer in his situation would believe that the suspect posed a risk of serious harm to other officers or members of the public?

(2) Did the law clearly establish that this use of potentially deadly force was unlawful, when existing precedent did not address the use of force against a fleeing suspect who had explicitly threatened to shoot police officers?

PARTIES TO THE PROCEEDING

Petitioner Chadrin Lee Mullenix, in his individual capacity, was the Defendant-Appellant in the court of appeals.

Respondents Beatrice Luna, individually and as representative of the estate of Israel Leija, Jr., and Christina Marie Flores, as next friend of J.L. and J.L., minor children, were the Plaintiffs-Appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The court of appeals' decision creates two separate circuit splits. And it contradicts *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), which unanimously confirmed that the Fourth Amendment gives police leeway during high-speed car chases to protect the public, and that qualified immunity shields officers from personal liability unless existing precedent establishes "beyond debate" that their conduct was unlawful.

The Fifth Circuit heeded neither of these admonitions. It denied qualified immunity to a police officer who used deadly force against a suspect who not only evaded arrest and initiated a high-speed nighttime car chase but also made explicit threats to use deadly

force against police officers. As interpreted by the court of appeals, the Fourth Amendment forbids an officer to use deadly force against a fleeing suspect unless and until alternative, non-deadly means have failed—even when the suspect has threatened to use deadly force against other officers, and even when alternative means will expose other officers and members of the public to a serious risk of harm. The Fifth Circuit held that this principle was clearly established without identifying any existing precedent considering the use of force against a fleeing suspect who threatened to shoot police officers.

This case therefore presents issues of exceptional importance, as police need proper latitude to protect themselves and the public from dangerous fleeing suspects in high-speed car chases. The Fifth Circuit's decision creates an unprecedented limitation on the use of force, which, if left unreviewed, will have a chilling effect on the seizure of fleeing suspects, thereby increasing the risk to officers and civilians.

OPINIONS BELOW

On August 7, 2013, the United States District Court for the Northern District of Texas denied Petitioner's motion for summary judgment. The district court's order is available at 2013 WL 4017124. *See* Pet. App. 25a–38a.

On August 28, 2014, the Fifth Circuit issued an opinion affirming the district court, with Judge King dissenting. That opinion is available at 765 F.3d 531. *See* Pet. App. 55a–92a. On December 19, 2014, the

Fifth Circuit withdrew its initial opinion, issued a substitute opinion, and denied the petition for rehearing en banc, with Judges Jolly, King, Davis, Jones, Smith, Clement, and Owen dissenting from the denial of rehearing en banc. The Fifth Circuit's substitute opinion is available at 773 F.3d 712. *See* Pet. App. 1a–24a. The Fifth Circuit's order denying the petition for rehearing en banc and the dissenting opinions are available at 777 F.3d 221. *See* Pet. App. 39a–52a.

JURISDICTION

The Fifth Circuit had appellate jurisdiction because the district court's order denying Petitioner's motion for summary judgment was a final decision within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 527–30 (1985).

On December 19, 2014, the Fifth Circuit entered judgment denying Petitioner's petition for rehearing en banc, Pet. App. 53a–54a, and issued a substitute opinion affirming the district court, Pet. App. 1a. Petitioner filed this timely petition for writ of certiorari on March 19, 2015. *See* Sup. Ct. R. 13(1), (3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents seek damages under 42 U.S.C. § 1983 for an alleged violation of the decedent's rights under the Fourth Amendment.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983.

STATEMENT

1. At 10:21 p.m. on March 23, 2010, an officer of the Tulia, Texas, Police Department attempted to serve an arrest warrant on Israel Leija, Jr. at a Sonic drive-in restaurant. When the officer informed Leija that he was under arrest, Leija sped away in his car toward Interstate 27, which he entered near mile marker 77. Texas Department of Public Safety ("DPS") Trooper Gabriel Rodriguez joined the pursuit and took the lead. As the chase proceeded north on I-27 at speeds up to 110 miles per hour, Leija made two calls to the Tulia Police Dispatch stating that he had a gun and threatening to shoot police officers. Pet. App. 26a–27a.

As the pursuit continued, several officers joined in the effort to capture Leija. Officer Troy Ducheneaux of the Canyon, Texas, Police Department stopped to set up tire spikes underneath an overpass at Cemetery Road and I-27, near mile marker 103. Other officers prepared to set up tire spikes at two additional locations farther north on I-27. Pet. App. 3a, 27a.

Defendant DPS Trooper Chadrin Mullenix was on patrol thirty miles north of the chase when he responded. Mullenix and the other officers were informed of Leija's threats, Pet. App. 3a–4a, and Mullenix was told that Leija might be intoxicated, Pet. App. 31a. Aware that other officers were preparing to set up tire spikes, Mullenix parked his patrol car on the Cemetery Road overpass above I-27. Pet. App. 4a.

After he reached the overpass, Mullenix informed Rodriguez that he intended to fire his rifle from the bridge to disable Leija's car. Rodriguez responded, "10-4," gave Mullenix his location, and told him that Leija was going 85 miles per hour. Mullenix then asked the Amarillo DPS dispatch to inform his supervisor, Sergeant Robert Byrd, of his plan to fire at Leija's car and to ask whether he thought it was "worth doing."[1] Before the dispatch responded, Mullenix got out of his patrol car, took his rifle from the trunk, and took a shooting position on the south side of the bridge. Pet. App. 4a–5a, 28a. At some point thereafter, the DPS dispatch relayed Sergeant Byrd's message to "stand by" and "see if the spikes work first." Pet. App. 5a. The parties dispute whether or not Mullenix received that message.[2]

As he waited for the pursuit, Mullenix discussed his plan to disable Leija's vehicle with Randall County Sheriff's Deputy Tom Shipman, who reminded Mullenix that there was another officer underneath the

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[1] The parties dispute the details of Mullenix's communication with the Amarillo DPS dispatch. Plaintiffs allege that Mullenix contacted Byrd to "request permission" to fire. Pet. App. 4a. Mullenix testified that he did not need permission but merely asked for Byrd's advice. Pet. App. 4a–5a. Byrd confirmed that Mullenix did not need permission. Pet. App. 83a n.1.

[2] Mullenix stated that he did not hear the response because he did not turn on his outside loudspeakers. Plaintiffs alleged that Mullenix should have been able to hear the response through his police radio, since his trunk was open, or through Ducheneaux's radio underneath the bridge. Pet. App. 5a, 28a–29a.

bridge. Mullenix later testified that he was not sure who was underneath the overpass, where precisely that officer was positioned, or whether that officer had set up tire spikes. Pet. App. 5a.

The pursuit reached Mullenix approximately three minutes after he reached the overpass. When Leija approached, Mullenix fired six rounds at his car. Leija's car continued under the overpass, hit the tire-spike strip set out by Ducheneaux, went out of control, and rolled two-and-a-half times. Pet. App. 4a, 5a, 30a. Shortly afterward, Leija was pronounced dead. His death was caused by a shot to the neck. Pet. App. 6a, 30a. After the pursuit ended, officers discovered that Leija did not have a gun. Pet. App. 3a.

Plaintiffs sued Mullenix, Rodriguez, the Texas DPS, and Texas DPS Director Steve McCraw under the Texas Tort Claims Act and 42 U.S.C. § 1983. Pet. App. 6a–7a. Claims against Rodriguez, McCraw, and the DPS were dismissed. Mullenix moved for summary judgment based on qualified immunity. Pet. App. 7a.

2. The district court denied Mullenix's motion for summary judgment. It determined that at the time of the shooting, clearly established law provided:

> a police officer's use of deadly force is justified only if a reasonable officer in Defendant Mullenix's position had cause to believe that there was an immediate threat of serious physical harm or death to himself which Officer Mullenix has testified did not exist in

> this case—or there existed at the time of the shooting an immediate threat of serious physical harm or death to others.

Pet. App. 35a–36a (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The summary judgment evidence included Mullenix's testimony that at the time of the shooting, he believed that Leija posed a risk of serious injury or death to the officer under the Cemetery Road overpass, other officers setting out spikes, and possibly citizens in the cities of Canyon and Amarillo if the chase continued. Pet. App. 36a. The court nevertheless denied summary judgment, finding genuine issues of material fact concerning "the existence of an immediate risk of serious injury or death"; whether Mullenix "acted recklessly, or acted as a reasonable, trained peace officer would have acted" in the circumstances; "whether Mullenix did or did not hear, and should have obeyed, the instructions from his superior officer to let the other officers . first try the planned non-lethal or less-dangerous methods being utilized to end the high-speed pursuit"; and whether there existed "any *immediate* threat to officers involved in the pursuit [or] to other persons who were miles away from the location of the shooting." Pet. App. 36a–37a.

3.a. On August 28, 2014, a divided panel of the Fifth Circuit affirmed, finding that a genuine issue of material fact as to "[t]he immediacy of the risk posed by Leija" precluded summary judgment. Pet. App. 66a. In the court of appeals' view, two facts "negate[d] the risk factors central to the reasonableness find-

ings" in other cases. Pet. App. 67a. First, Leija's driving did not pose a serious risk because traffic was "light, there were no pedestrians, businesses or residences along the highway, and Leija ran no other cars off the road and did not engage any police vehicles." Pet. App. 69a. Second, "the non-lethal methods that were already prepared were never given a chance to work." Pet. App. 70a. Accordingly, the Fifth Circuit determined that "a jury could find that a reasonable officer would have concluded that the risk Leija posed was not sufficiently immediate so as to justify deadly force, and that the non-lethal methods already in place could stop the chase without the need for deadly force." Pet. App. 75a.

Moving to the second step of the qualified-immunity analysis, the Fifth Circuit concluded:

> At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a substantial and immediate threat, violated the Fourth Amendment.

Pet. App. 78a. The Fifth Circuit affirmed the denial of qualified immunity on the ground that "the immediacy of the risk posed by Leija cannot be resolved as a matter of law at the summary judgment stage." *Ibid.*

b. Judge King dissented. She explained that the factual dispute alleged by the majority was "simply a restatement of the objective reasonableness test," which presented a legal question for the court. Pet.

App. 80a. Based on the summary-judgment record, Judge King concluded that Mullenix's conduct was not objectively unreasonable given Leija's threat to shoot police officers, the presence of police officers in Leija's path, and Leija's own culpability for the risks he created. Pet. App. 85a–86a.

Judge King criticized the majority for minimizing the risk Leija posed to Ducheneaux and other officers. She noted that the cases distinguished by the majority concerned suspects who were on foot or in stopped vehicles, giving officers a chance to observe the suspects that was not available to the officers who responded to Leija's high-speed nighttime flight. Pet. App. 86a–87a. In her view, the majority's suggestion that Leija's threat to shoot officers did not create a serious risk—because he was "not fleeing the scene of a violent crime," and "no weapon was ever seen," Pet. App. 87a—"eviscerates the Supreme Court's requirement that we adopt the perspective of a reasonable officer on the scene," Pet. App. 88a.

Responding to the majority's conclusion that Mullenix should have waited to see if non-lethal alternatives stopped the chase, Judge King noted that "Mullenix reasonably believed that deploying tire spikes along the highway posed a significant risk of harm to officers." Pet. App. 88a. She also pointed out that in *Thompson v. Mercer*, 762 F.3d 433 (5th Cir. 2014)—a case distinguished by the majority—the non-lethal methods included shooting at the suspect's tires, and "tire spikes twice failed to stop the suspect's truck." Pet. App. 88a–89a. Given the evidence that tire spikes

presented risks of their own and were often ineffective, an objectively reasonable officer could have concluded that the risks outweighed the potential benefits. Pet. App. 89a.

In light of Mullenix's knowledge that an officer was underneath the overpass, that his flashing patrol lights would alert Leija to his presence, and that operating tire spikes could expose the officer to gunfire, Judge King concluded that the risks presented to Mullenix "were at least as particularized as in the Supreme Court's decisions in *Scott* and *Brosseau* and our decision in *Thompson*, where the officers employing force were not aware of the precise location or identity of the other officers and civilians they were acting to protect." Pet. App. 89a. Regarding the immediacy of the threat, Judge King found it

> difficult to conceive of a threat that is more immediate than the one Leija posed. At the moment Mullenix fired, Leija was seconds away from crossing the path of one of the officers he had threatened to shoot and minutes away from passing several other officers.

Pet. App. 90a. And despite the majority's criticism of Mullenix's plan to disable Leija's car, Judge King pointed out that in *Thompson*, "an officer positioned at the side of the road aimed at and successfully shot the radiator of the fleeing suspect's vehicle." Pet. App. 91a n.3.

4.a. Mullenix filed a petition for rehearing en banc, which the Fifth Circuit denied by a 9-to-6 vote. Pet. App. 40a. In response to Mullenix's rehearing petition, the panel majority withdrew its opinion of August 28, 2014, and issued a substitute opinion affirming the denial of summary judgment. Pet. App. 1a.

In the substitute opinion, most of which was identical to the original opinion, the court of appeals removed all references to the jury and to disputed questions of fact, replacing them with statements to the effect that Mullenix's conduct was objectively unreasonable as a matter of law. *See, e.g.*, Pet. App. 12a. In its discussion of clearly established law, the court altered its formulation slightly to state that "the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a *sufficiently* substantial and immediate threat, violated the Fourth Amendment." Pet. App. 24a (emphasis added).

b. Judge Jolly, joined by six other judges, dissented from the denial of rehearing en banc.[3] Pet. App. 40a. In his dissenting opinion, he criticized the panel's substitute opinion sharply, concluding:

> the panel majority either does not understand the concept of qualified immunity or, in defiance thereof, impulsively determines

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[3] Although Judge King dissented from the denial of rehearing en banc, the order denying the en banc petition does not reflect that she voted in the court's en banc poll. Pet. App. 40a.

> the "right outcome" and constructs an opinion to support its subjective judgments, which necessarily must ignore the concept and precedents of qualified immunity.

Pet. App. 40a–41a. Judge Jolly faulted the panel majority for the following errors, among others:

- failing "to recite or accept the clearly established law that applies to car-chase cases," Pet. App. 44a;
- deeming Mullenix's conduct unreasonable based on its subjective judgment "that tire spikes should have been the preferred alternative means for stopping Leija's car," Pet. App. 45a;
- "fail[ing] to heed the Supreme Court's instruction to account for Leija's culpability," *ibid.*;
- failing to view the facts from Mullenix's perspective, Pet. App. 46a;
- failing to grant qualified immunity to Mullenix despite the lack of clear notice that his conduct was unconstitutional, *ibid.*; and
- improperly relieving Plaintiffs of their burden to show that Mullenix was not entitled to qualified immunity, Pet. App. 47a.

Considering the facts known to Officer Mullenix—particularly his knowledge that Leija fled arrest for an extended period, that Leija was suspected of being intoxicated, that Leija said he had a gun and would

shoot any officer he saw, and that Officer Ducheneaux was in Leija's path below Mullenix, Pet. App. 49a—Judge Jolly concluded that the court's opinion "condone[d] second-guessing of split-second decisions—in contravention to the principles of qualified immunity," Pet. App. 50a–51a.

Judge King joined in Judge Jolly's opinion, writing separately to note that the panel majority did not consult her about the withdrawal and substitution of its opinion. Pet. App. 51a. She concluded, "As the law now stands, Mullenix was entitled to qualified immunity." Pet. App. 52a.

REASONS TO GRANT THE PETITION

I. THE FIFTH CIRCUIT CONTRAVENED THIS COURT'S RECENT PRECEDENTS IN ERRONEOUSLY DENYING QUALIFIED IMMUNITY.

A. The Fifth Circuit's Fourth Amendment Analysis Failed to Adopt the Officer's Perspective or Account for Leija's Direct Threat to Shoot Police Officers.

At the first step of a qualified immunity analysis, the question whether an officer's conduct is objectively unreasonable "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Plumhoff*, 134 S. Ct. at 2020 (quoting *Graham*, 490 U.S. at 396). The officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with

the 20/20 vision of hindsight." *Ibid.* (internal quotation marks omitted). Thus, courts must consider only the facts known to the officer "when the conduct occurred." *Saucier v. Katz*, 533 U.S. 194, 207 (2001).

1. The Fifth Circuit violated this cardinal rule by failing to consider the facts from Officer Mullenix's perspective. Instead, with the benefit of hindsight, the court of appeals judged Mullenix's conduct to be unreasonable based on facts not available to him. Its determination that Mullenix's conduct was objectively unreasonable directly contravenes this Court's recent decisions in cases involving high-speed pursuits.

In *Plumhoff*, 134 S. Ct. at 2021, the Court held that officers did not violate the Fourth Amendment when they fired 15 shots at a fleeing suspect even though a collision had brought the high-speed chase "temporarily to a near standstill." Although the threat to other drivers had arguably abated at the time of the shooting, the Court held that the use of force was justified because "all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." *Id.* at 2022.

Similarly, in *Scott v. Harris*, an officer's use of potentially lethal force was deemed objectively reasonable because of "an actual and imminent threat to the lives of any pedestrians who *might have been present*, to other civilian motorists, and to the officers involved in the chase." 550 U.S. 372, 384 (2007) (emphasis added). The Court recognized an actual and imminent

threat despite video evidence that "when Scott rammed respondent's vehicle it was not threatening any other vehicles or pedestrians. (Undoubtedly Scott *waited* for the road to be clear before executing his maneuver.)." *Id.* at 380 n.7. Notwithstanding the lack of an immediate threat at the moment of impact, *Scott* held, "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386.

Considered in the light of *Scott* and *Plumhoff*, this should have been an *a fortiori* case. At the time he fired his rifle to disable Leija's car, Mullenix knew that Leija had explicitly threatened to shoot any officer he saw, and he knew that a fellow officer was parked underneath the overpass with flashing lights alerting Leija to his presence. Whereas the officers in *Plumhoff* acted when the threat had temporarily abated, Mullenix acted when the threat continued to mount. And unlike *Scott*, the circumstances Mullenix faced presented a particular risk to a specific individual. Mullenix was entitled to take Leija's threat to shoot police officers at face value.

The facts gave Officer Mullenix every reason to believe that Leija posed a risk of serious bodily harm or death to the officer below him, as well as other officers and civilians. It would have been unreasonable for Mullenix, or any other officer in his position, to discount that risk. Without some particular reason to believe that the suspect would not follow through on his

threat to shoot—and Mullenix had none—he did not act unreasonably in using deadly force to stop Leija before he could reach the people he had threatened with deadly force.

2. Instead of asking whether Officer Mullenix made a reasonable decision, the Fifth Circuit asked whether he made the *right* decision based on information he did not have. The court of appeals determined that Officer Mullenix's use of force was objectively unreasonable because, with the benefit of a fully developed summary-judgment record, it decided that this force was not necessary.[4] According to the Fifth Circuit, the Fourth Amendment required Mullenix to wait and see if the spike strip stopped Leija's car. But at the moment he had to make a decision, Officer Mullenix did not know if spike strips had been laid out below the overpass, much less whether they would work. And Mullenix had to consider the possibility that Leija would shoot Officer Ducheneaux whether or not the spike strip stopped his car. The court of appeals had the benefit of knowing that Leija did not have a gun or attempt to shoot Ducheneaux, but Officer Mullenix did not.

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[4] *See* Pet. App. 21a ("[Mullenix's] justification for the use of force was to disable the car, but alternative methods were already in place to achieve the same goal, undermining the asserted necessity for resorting to deadly force at that particular instant."). But as Judge Jolly noted, "the record does not begin to suggest, which alternative—bullets to the engine block or spikes to the tires—would have been less likely to produce a deadly result." Pet. App. 47a.

The Fifth Circuit also minimized the critical information Mullenix *did* have: Leija made two explicit threats to shoot police officers. Instead of considering the significance of those threats to a reasonable officer on the scene, the court of appeals labored to downplay the risk Leija presented:

> [A]lthough Leija had stated to the dispatcher that he was armed and would shoot officers, he was not fleeing the scene of a violent crime, no weapon was ever seen, and at the time of the shooting, most officers and bystanders were miles away, where they would not have been encountered until after the spikes were given a chance to stop the chase.

Pet. App. 18a–19a. This rationalization of Leija's flight is misguided for several reasons. First, whether or not Leija was fleeing the scene of a violent crime is irrelevant; he had expressly threatened (twice) to *commit* a violent crime.[5] Second, as to Leija's failure to brandish a weapon during the chase, Mullenix did

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[5] Leija's threat to shoot police officers arguably constituted a felony under Texas law. *See* Tex. Penal Code § 22.07(a)(6) ("A person commits an offense if he threatens to commit any offense involving violence to any person or property with intent to . . influence the conduct or activities of a branch or agency of the federal government, the state, or a political subdivision of the state."); *id.* § 22.07(e) ("An offense under Subsection (a)(4), (a)(5), or (a)(6) is a felony of the third degree."); *see also Phillips v. State*, 401 S.W.3d 282 (Tex. App.—San Antonio 2013, pet. ref'd) (upholding conviction based on defendant's statement to 911 operator that he would kill a certain police officer if he was sent to his house).

not have the luxury of waiting to see if Leija followed through on his threat; he had to take it seriously. *See, e.g., Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) ("A reasonable officer need not await the 'glint of steel' before taking self-protective action "); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997) ("[A]n officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force."); *cf. Scott*, 550 U.S. at 385 (rejecting the argument that police should have ceased the pursuit instead of ramming the suspect's car, explaining that "the police need not have taken that chance and hoped for the best"). Finally, the statement that "most officers and bystanders were miles away" writes Officer Ducheneaux out of the picture, ignoring the most immediate risk that Mullenix had to consider.

The Fifth Circuit's judgment that Mullenix should have given other officers a chance to stop Leija with tire spikes further minimizes the risk to Officer Ducheneaux. According to the court:

> the facts, taken in the light most favorable to the plaintiffs, also show that officers were trained to deploy spikes in a location where they were able to take a protective position, that there were several pillars at the Cemetery Road overpass and that Ducheneaux had positioned himself behind a pillar as he was trained to do.

Pet. App. 19a. Even if Ducheneaux had taken a protective position, it would not have guaranteed his

safety from Leija. That officers "had been trained to take a protective position while deploying spikes, if possible, so as to minimize the risk posed by the passing driver," Pet. App. 3a, demonstrates an inherent risk. But Ducheneaux's actual position is beside the point: Mullenix "did not actually know Ducheneaux's position or what he was doing beneath the overpass." Pet. App. 19a. The Fifth Circuit therefore had no basis to rely on the "facts" about Ducheneaux's position to conclude that Mullenix did not "reasonably perceive[] an immediate threat at the time of the shooting, sufficient to justify the use of deadly force." Pet. App. 20a.

To the extent it acknowledged the risk to Ducheneaux, the Fifth Circuit faulted Mullenix for making a decision without complete knowledge of the facts. Recognizing that Mullenix did not know what the officer under the bridge was doing, Pet. App. 5a, 19a, the court did not consider how this might have affected his assessment of the risk. Nor did the court consider Leija's relative culpability, contrary to this Court's instruction in *Scott*, 550 U.S. at 384. Instead, the Fifth Circuit suggested that Mullenix should not have acted at all because he "lacked sufficient knowledge to determine whether or not Ducheneaux was in immediate danger from Leija, or whether Mullenix's own actions were decreasing the risk to Ducheneaux." Pet. App. 19a n.2.

Faulting Mullenix for acting without "sufficient knowledge" misses the point. In the line of duty, officers must make decisions and take action based on incomplete or imperfect information. The very purpose

of qualified immunity is "to protect officers from the sometimes hazy border between excessive and acceptable force." *Saucier*, 533 U.S. at 206 (internal quotation marks omitted).

The Fifth Circuit's failure to consider the facts from Mullenix's perspective deprived him of any leeway to make reasonable judgments. A reasonable belief about the risk presented, even if mistaken, may justify the use of greater force than was actually necessary. "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was necessary." *Id.* at 205. Here, Mullenix reasonably believed that Leija intended to shoot Ducheneaux and other officers, so he was justified in using force to stop Leija from reaching them.

B. In Finding Clearly Established Law, the Fifth Circuit Disregarded This Court's Decisions and Concocted a Novel Legal Standard.

1. The Fifth Circuit Ignored This Court's Consistent Warning Not to Rely on General Propositions of Law.

At the second step of the qualified immunity analysis, this Court has established distinct guidelines for courts to identify clearly established law:

> To be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is

> doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question *beyond debate*.

Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012) (internal citations and quotation marks omitted) (emphasis added). General concepts not rooted in specific facts cannot provide sufficient notice to officers in the line of duty. *See, e.g.*, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) ("The general proposition that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."). This Court has therefore warned courts not to frame the law at a high level of generality.

The Fifth Circuit failed to tailor its statement of law to the circumstances Mullenix faced. Devoting little attention to the question, it stated:

> We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.

Pet. App. 22a (quoting *Lytle v. Bexar County*, 560 F.3d 404, 417 (5th Cir. 2009)). At least one court has criticized this very formulation of the law, noting that "[w]hile this general principle is correct, it still begs the question of what constitutes a *sufficient* threat."

Cordova v. Aragon, 569 F.3d 1183, 1193 (10th Cir. 2009). The Fifth Circuit made no attempt to explain why the threat posed by Leija was not "sufficient."

More specific notice is required to deny qualified immunity. This Court has expressly rejected attempts to define the law at a similar level of generality. In *Anderson v. Creighton*, for instance, the Court held that "the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances" did not provide adequate warning that the circumstances of a particular warrantless search "did not constitute probable cause and exigent circumstances." 483 U.S. 635, 640–41 (1987); *cf. Wilson v. Layne*, 526 U.S. 603, 615 (1999) (considering "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed").

If qualified immunity depends on the application of general principles, an officer's individual liability will likely hinge on an arbitrary choice among various general propositions. In this case, for instance, the court could have found clear support for Officer Mullenix's use of force in the general standard of *Tennessee v. Garner*: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." 471 U.S. 1, 11 (1985). Leija's threat

to shoot officers gave Mullenix probable cause to believe that Officer Ducheneaux faced a risk of serious injury or death. That belief, even if mistaken, should have entitled him to qualified immunity under *Graham*. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) ("Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." (quoting *Anderson*, 483 U.S. at 641)); *cf. Fisher v. City of San Jose*, 558 F.3d 1069, 1081 (9th Cir. 2009) ("[T]hreatening to shoot police officers constitutes separate criminal behavior that establishes probable cause for arrest independent of the initial offense.").

Of course, *Graham* is also cast at a high level of generality and therefore cannot provide clear notice in most cases. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (holding that the court of appeals erred when it "proceeded to find fair warning in the general tests set out in *Graham* and *Garner*"). A general statement of law can "'clearly establish' the answer, even without a body of relevant case law" only "in an obvious case." *Ibid.* But even if this is not the obvious case for which *Graham* gives a clear answer, probable cause is a more objective standard (and produces a more obvious answer here) than the Fifth Circuit's formulation, which would effectively require courts to second-guess an officer's decision based on a subjective, retrospective judgment that the risk was not "sufficiently substantial and immediate." This defeats the purpose of qualified immunity, which rests on the principle that "officials should not err always

on the side of caution because they fear being sued." *Bryant*, 502 U.S. at 229 (internal quotation marks omitted). Without clear notice that particular conduct is unlawful, and with knowledge that his conduct will be judged on the vague standard of "sufficiency," a reasonable officer has every incentive to err on the side of caution.

2. It Was Not Clearly Established that Police Must Exhaust Non-Lethal Alternatives Before Using Deadly Force Against a Suspect Who Threatened to Shoot Police Officers.

Leija's threat to shoot police officers distinguishes this case from existing precedent regarding the use of force against fleeing suspects. Before an officer may be subjected to personal liability, "existing precedent must have placed the statutory or constitutional question beyond debate." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam); *Plumhoff*, 134 S. Ct. at 2023. But as of March 2010, neither this Court nor the Fifth Circuit had considered a case in which a suspect made explicit verbal threats to shoot police officers. A rule prohibiting the use of force in these circumstances would therefore require a settled consensus among other courts before a reasonable officer in Texas could be charged with knowledge that his use of force was unlawful. *See, e.g.*, *Plumhoff*, 134 S. Ct. at 2023. The Fifth Circuit identified no such consensus, nor did it cite a single case in which a suspect explicitly threatened to shoot police officers.

The Fifth Circuit's inability to find any comparable authority should have resulted in qualified immunity for Officer Mullenix. Although a decision on indistinguishable facts is not essential, existing precedent must be clear enough to demonstrate, beyond any reasonable disagreement, that particular conduct is clearly *unlawful*. *See, e.g.*, *Saucier*, 533 U.S. at 202 ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."); *cf. Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on th[e] issue, immunity should be recognized.").

But instead of asking whether Officer Mullenix's conduct was *foreclosed* by clearly established law, the Fifth Circuit asked whether clearly established law *supported* his use of force. This put the onus on Mullenix to identify existing precedent that endorsed his specific conduct under the Fourth Amendment. As a result, the Fifth Circuit denied qualified immunity by distinguishing cases finding officers' conduct to be reasonable, including cases decided after the events in question. For instance, when Mullenix relied on *Plumhoff* to argue that his conduct was not clearly established as unlawful,[6] the Fifth Circuit fell back on gen-

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[6] While later-decided cases may demonstrate the absence of clearly established law, they cannot provide clear notice that particular conduct is unlawful. *See, e.g.*, *Plumhoff*, 134 S. Ct. at 2023 (citing *Brosseau* to demonstrate the absence of clearly established law in 1999, but noting, "We did not consider later decided

eral principles, responding that *Plumhoff* did not "undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders." Pet. App. 23a. It then distinguished the Fifth Circuit's decision in *Thompson*—decided, like *Plumhoff*, in 2014—as holding that the use of force "was not clearly established as unreasonable" on different facts. Pet. App. 23a–24a ("[T]he fleeing suspect had stolen a car and kidnapped a woman, had evaded four attempts to stop the car with alternate methods of seizure, and whose driving continued to pose a 'tremendous risk' to the public and other officers." (quoting *Thompson*, 762 F.3d at 440–41)).

In its discussion of clearly established law, the Fifth Circuit did not discuss a single case holding the use of force against a fleeing suspect to be unreasonable on similar facts, much less a case denying qualified immunity. *Cf. Ryburn v. Huff*, 132 S. Ct. 987, 990 (2012) (per curiam) (summarily reversing the denial of qualified immunity where "[n]o decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case"). But because the Fifth Circuit improperly shifted the burden to Officer Mullenix, the absence of existing precedent counted against him.

The Fifth Circuit's flawed analysis also led it to recognize an implicit duty to exhaust non-lethal

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cases because they 'could not have given fair notice to [the officer].'" (quoting *Brosseau*, 543 U.S. at 200 n.4)).

means before using deadly force against a suspect. *See* Pet. App. 23a–24a. If anything, existing precedent would have suggested that officers are *not* required to exhaust non-lethal alternatives before using deadly force. As of 2007, this Court had flatly rejected a "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382. The Fifth Circuit did not identify any subsequent decision from this Court or a settled consensus among the lower courts to establish such a precondition, and none exists. *See, e.g.*, *Fenwick v. Pudimott*, No. 13-5130, 2015 WL 590295, at *7 n.1 (D.C. Cir. Feb. 13, 2015) (Henderson, J., concurring) ("To the extent the majority opinion implies that law enforcement officers must first try non-lethal means to neutralize a deadly threat or risk violating the Fourth Amendment, it is irreconcilable with a decades-long line of U.S. Supreme Court precedent." (citing *Brosseau*, 543 U.S. at 197-98; *Garner*, 471 U.S. at 11)).

In fact, the court of appeals' recognition of a duty to exhaust non-lethal means conflicts directly with this Court's decision in *Brosseau*. In that case, an officer shot a driver from behind to protect "other officers on foot who [she] *believed* were in the immediate area" and "any other citizens who *might be* in the area." 543 U.S. at 197 (emphases added). This Court held that the officer was entitled to qualified immunity even though the driver "had just begun to flee and . had not yet driven his car in a dangerous manner." *Plumhoff*, 134 S. Ct. at 2023.

Given the lack of authority addressing the use of force against suspects who expressly threaten to shoot police officers, Mullenix's conduct—even if it were unreasonable—fell somewhere in the border between excessive and acceptable force. It follows that it would not have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202; *cf. id.* at 210 (Ginsburg, J., concurring in the judgment) ("Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, similarly situated, have believed the force employed was lawful?"). But the Fifth Circuit never asked that question.[7] As a result, it failed to grant Mullenix the qualified immunity to which he is entitled.

II. THE FIFTH CIRCUIT'S DECISION CREATES TWO SEPARATE CIRCUIT SPLITS.

A. The Fifth Circuit's Holding that Mullenix's Conduct Was Objectively Unreasonable Conflicts with Decisions of the First, Sixth, Eighth, and Eleventh Circuits.

The Fifth Circuit's holding that Mullenix's conduct was objectively unreasonable conflicts with decisions

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[7] Neither did the district court. After formulating clearly established law in a manner that incorporated the question of reasonableness, Pet. App. 35a–36a, the district court denied summary judgment based solely on its conclusion that the reasonableness of Mullenix's conduct presented a genuine issue of material fact. Pet. App. 36a–37a.

in other circuits, which have consistently found the use of deadly force to be reasonable in similar circumstances, even in the absence of a direct threat to shoot police officers.

The Eleventh Circuit in *Quiles v. City of Tampa Police Department*, No. 14-12875, 2015 WL 53707, at *3 (11th Cir. Jan. 5, 2015) (per curiam), held that an officer did not violate the Fourth Amendment by shooting an unarmed suspect who was attempting to escape from an arrest on foot. Because the officer "believed reasonably (although mistakenly) that [he] had stolen and was still in possession of [another officer's] gun," the use of deadly force was reasonable even though the suspect "was running away when he was shot and had not threatened definitely the officers with a gun." *Ibid.* Likewise, here, Mullenix rightfully believed (although mistakenly) that Leija had a gun—and Leija had even threatened to shoot police officers.

Long v. Slaton, 508 F.3d 576, 581 (11th Cir. 2007), explicitly rejected an argument that alternative means should have been used before an officer fired shots at a suspect attempting to flee in a car. The Eleventh Circuit held that an officer did not act unreasonably when he fired several shots at a mentally unstable suspect who was backing away from the officer in the officer's own patrol car. Even if the suspect did not pose an "immediate" threat, the court held that "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect." *Ibid.* The court noted that the officer gave the suspect

clear warning (an option not available to Mullenix), and it rejected the plaintiffs' argument that the officer should have used "alternative means such as shooting out the tires of the cruiser, using spike strips, or allowing [the suspect] to leave." *Id.* at 583.

In *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014), the Sixth Circuit held that an officer did not act unreasonably when he shot a fleeing driver when any danger to officers on the scene had passed. The officer's use of force was deemed reasonable because he reasonably believed that the driver "posed a continuing risk to the other officers present in the immediate vicinity." *Id.* at 377. Here, the danger to Officer Ducheneaux had not passed, and even if it had, Leija posed a continuing risk to other officers.

The First Circuit in *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 1183 (2015), held that an officer acted reasonably in firing multiple shots at a driver who was attempting to resume a high-speed chase after crashing into a stone wall and a telephone pole. The officer fired two shots when the car was driving toward him and two more when it was driving away from him, possibly toward another officer. *Id.* at 28. The First Circuit held that the officer's conduct was objectively reasonable given the risk to himself, the risk to another officer, and the risk that the driver "'would once again pose a deadly threat for others' if he had resumed his flight." *Id.* at 29 (quoting *Plumhoff*, 134 S. Ct. at 2022). In this case, Mullenix fired shots immediately before Leija reached Officer

Ducheneaux and shortly before he would have reached other officers if the chase continued.

In *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), the Eighth Circuit ruled that an officer did not violate the Fourth Amendment when he fired eight shots at an unarmed suspect who was approaching him on foot with his hands raised or extended to his sides. The victim had not brandished a firearm, and bystanders yelled that the suspect was unarmed. The officer's use of deadly force was nevertheless deemed reasonable because the suspect was intoxicated, the officer had been told that the suspect was armed, and the officer "was in no position—with [the victim] continuing toward him—to verify which version was true." *Id.* at 966–67; *see also Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding that an officer who fired his pistol from a moving police car in an attempt to disable the engine of a fleeing eighteen-wheeler did not act unreasonably where previous efforts, including "shots at its tires and radiator" by officers on the side of the road, did not end the chase). Here, Mullenix also had been told the suspect was armed, and Mullenix was in no position to verify that fact.

In this case, Mullenix reasonably concluded that Leija presented a threat of serious physical harm. Mullenix was told Leija was armed, Leija was driving towards Ducheneaux, and Mullenix had no chance to verify the facts before Leija reached Ducheneaux. Leija's threat to shoot police officers eliminated any doubt about the risk he presented. Officer Mullenix's attempt to eliminate that risk was not unreasonable.

as confirmed by precedents in the First, Sixth, Eighth, and Eleventh Circuits.

B. The Fifth Circuit's Finding of Clearly Established Law Conflicts with Decisions of the Tenth and D.C. Circuits.

The Fifth Circuit's holding that Mullenix's conduct violated clearly established law creates a separate circuit split with the Tenth and D.C. Circuits.

In *Fenwick v. Pudimott*, the D.C. Circuit held that an officer who shot a sixteen-year-old suspected car thief as he tried to drive out of a parking lot was entitled to qualified immunity. It explained that the case, like *Brosseau*, involved a suspect "who posed no immediate threat to any officer or bystander when the officers fired," and officers who "justified their use of deadly force by claiming concern for the safety of other officers and bystanders." 2015 WL 590295, at *5. In the instant case, Mullenix also had every reason to believe that Leija posed an immediate threat to Officer Ducheneaux, the officers stationed up the road, and any bystander who might have been in his way. The law did not clearly establish that Mullenix's response to those threats was unreasonable.

In *Cordova v. Aragon*, the Tenth Circuit held that an officer was entitled to qualified immunity when he shot a fleeing driver in the back of the head. The suspect, whose truck was pulling a trailer with stolen heavy equipment, led police on an extended nighttime chase, during which he drove on the wrong side of the highway and attempted to ram a police car. 569 F.3d

at 1186. The defendant officer started to set out tire spikes, but when the suspect's truck approached him, he gave up the effort, drew his gun, and fired multiple shots, all but one of which hit the side of the suspect's truck. *Id.* at 1187. The court assumed, for purposes of summary judgment, that the officer "was not in immediate danger and that no innocent bystanders were in the vicinity," and it found it likely "that whatever danger he might have perceived had passed by the time he fired the fatal shot." *Ibid.* Finding the law to be "vague on whether the potential risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death," the Tenth Circuit held that the officer was entitled to qualified immunity given precedent authorizing "the use of deadly force when a fleeing suspect poses a threat of serious harm to others," *id.* at 1193. Here, too, clearly established law did not provide that Mullenix had to see if tire spikes worked before firing at Leija's car.

III. THIS IS AN IDEAL VEHICLE TO ADDRESS THE QUESTIONS PRESENTED AND PROVIDE GUIDANCE ON THE APPLICATION OF *PLUMHOFF*.

This is an ideal vehicle for providing needed guidance on the important issue of police conduct while pursuing a fleeing suspect. The Fifth Circuit expressly ruled on both the reasonableness of Mullenix's conduct, Pet. App. 9a–21a, and whether the law was clearly established, Pet. App. 21a–24a. And both issues have been well vetted by the court of appeals.

Judge King wrote a thorough dissent from the majority's initial opinion; the panel majority issued a substitute opinion; and Judge Jolly's dissent from the denial of rehearing en banc highlights the profound consequences of the panel majority's substituted opinion.

While some qualified immunity cases may turn on fact-bound inquiries, the Fifth Circuit's opinion here announced propositions of law with a higher level of generality. The court held that (1) a fleeing suspect's threat to shoot police officers is not sufficient for an officer to use deadly force, Pet. App. 19a–20a, and (2) an officer cannot use deadly force until alternative means have been used to disable a car, Pet. App. 21a. Those legal questions are squarely presented for the Court's consideration. And the Fifth Circuit cited *Plumhoff* repeatedly, so this is also a good vehicle to provide guidance to the courts of appeals in applying this Court's recent precedent.

Nor are there any jurisdictional issues, as orders denying summary judgment based on a claim of qualified immunity are immediately appealable under the collateral-order doctrine. *Plumhoff*, 134 S. Ct. at 2018–19. The interlocutory posture does not counsel against review in qualified immunity cases. The Court has frequently granted certiorari to review summary judgment motions denying qualified immunity. *See, e.g.*, *id.* at 2018; *Scott*, 550 U.S. at 376; *Saucier*, 533 U.S. at 199–200. After all, qualified immunity is an "immunity from suit," and this immunity would be "irretrievably lost" if only "reviewed on appeal from a final judgment." *Plumhoff*, 134 S. Ct. at 2019.

This case is therefore an ideal vehicle for the Court to provide needed guidance to the courts of appeals on the important issue of police conduct while pursuing a fleeing suspect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Appendix

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13–10899

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2014

Lyle W. Cayce
Clerk

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs–Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant–Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before HAYNES and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

We withdraw our prior opinion of August 28, 2014, *Luna v. Mullenix*, 765 F.3d 531 (5th Cir.2014), and substitute the following.[1]

This § 1983 excessive use of force case arises from the shooting and death of Israel Leija, Jr. by Texas Department of Public Safety (DPS) Trooper Chadrin Mullenix during a high-speed pursuit. The district court denied Mullenix's motion for summary judgment on the issue of qualified immunity, holding that multiple genuine disputes of material fact existed as to the qualified immunity analysis. Because we conclude that Mullenix is not entitled to summary judgment on qualified immunity, we affirm.

I. Factual and Procedural Background

On March 23, 2010, at approximately 10:21 p.m., Sergeant Randy Baker of the Tulia Police Department followed Israel Leija, Jr. to a Sonic Drive–In to arrest him on a motion to revoke misdemeanor probation. The arrest warrant had been filed because (1) Leija had failed to complete all of his hours of community service, and (2) a new complaint of domestic violence had been filed against Leija, who was on probation. After some discussion with Baker, Leija fled the scene and headed north towards Interstate Highway 27 ("I–27"), with Baker in pursuit. Texas DPS Trooper Gabriel Rodriguez was on patrol nearby and took the lead in the pursuit. Around mile marker 77, Leija en-

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[1] Judge King, a member of the original panel in this case, did not participate in the consideration of this opinion. This matter is decided by a quorum. 28 U.S.C. § 46(d).

tered I–27 and continued north, with Rodriguez directly behind him. During the approximately 18 minutes that the pursuit lasted, Rodriguez followed Leija and captured the pursuit on his video recorder. The video supports the plaintiffs' assertions that although the pursuit proceeded north on 1–27 at speeds between 85 and 110 miles per hour, traffic on the dry roadway was light; Leija remained on the paved portion of the road with his headlights on, did not run any vehicles off the road, did not collide with any vehicles, and did not cause any collisions; there were no pedestrians or stopped vehicles along the road; and all of the pursuit occurred in rural areas, without businesses or residences near the interstate, which was divided by a wide center median.

As the pursuit headed north on I–27, other law enforcement units joined. Officer Troy Ducheneaux of the Canyon Police Department deployed tire spikes underneath the overpass at Cemetery Road and I–27. DPS Troopers set up spikes at McCormick Road, north of Cemetery Road. Other police units set up spikes at an additional location further north, for a total of three spike locations ahead of the pursuit. The record reflects that officers had received training on the deployment of spikes, and had been trained to take a protective position while deploying spikes, if possible, so as to minimize the risk posed by the passing driver.

During the pursuit, Leija twice called the Tulia Police Dispatch on his cell phone, claiming that he had a gun, and that he would shoot at police officers if they did not cease the pursuit. This information was relayed to all officers involved. It was discovered later that Leija had no weapon in his possession.

DPS Trooper Chadrin Mullenix was on patrol thirty miles north of the pursuit, and also responded. Mullenix went to the Cemetery Road overpass, initially intending to set up spikes at that location, but ultimately decided to attempt to disable the car by shooting it. He positioned his vehicle atop the Cemetery Road bridge, twenty feet above I–27, intending to shoot at the vehicle as it approached. Mullenix planned to use his .223 caliber M–4 rifle to disable the vehicle by shooting at its engine block, although he had never attempted that before and had never seen it done before. The district court noted that "[t]here is no evidence—one way or another—that any attempt to shoot out an engine block moving at 80 mph could possibly have been successful." Mullenix testified that he had been trained in shooting upwards at moving objects, specifically clay pigeons, with a shotgun. He had no training on how to shoot at a moving vehicle to disable it.

Mullenix's dash cam video reflects that once he got to the Cemetery Road overpass, he waited for about three minutes for the pursuit to arrive. Mullenix relayed to Officer Rodriguez that he was thinking about setting up with a rifle on the bridge. Rodriguez replied "10–4," told Mullenix where the pursuit was, and that Leija had slowed down to 85 miles per hour. Mullenix then asked the Amarillo DPS dispatch to contact DPS Sergeant Byrd, Mullenix's supervisor, to tell Byrd that he was thinking about shooting the car and to ask whether the sergeant thought that was "worth doing." According to plaintiffs' allegations, he contacted Byrd to "request permission" to fire at the vehicle. Mullenix denies that he requested or needed "permission," but

stated that he "asked for what [Byrd] advised" and asked to "get his advice." Mullenix did not wait for a response from Sergeant Byrd, but exited his patrol vehicle, took out his rifle, and took a shooting position on the bridge. During this time, the dispatcher relayed a response from Sergeant Byrd to "stand by" and "see if the spikes work first." Mullenix alleges that he was unable to hear that instruction because he had failed to turn on his outside loudspeakers, thereby placing himself out of communication with his dispatch or other officers involved in the pursuit. Plaintiffs allege that since the trunk was open, Mullenix should have heard the response. Mullenix did have his radio microphone on him. During the waiting minutes, Mullenix had a short, casual conversation with Randall County Sheriff's Deputy Tom Shipman about whether he could shoot the vehicle to disable it. When Shipman mentioned to Mullenix that there was another officer beneath the overpass, Mullenix replied that he did not think he would hit that officer.

As the two vehicles approached, Mullenix fired six rounds at Leija's car. There were no streetlights or ambient lighting. It was dark. Mullenix admitted he could not discern the number of people in Leija's vehicle, whether there were passengers, or what anyone in the car was doing. Mullenix testified that at the time of the shooting, he was not sure who was below the overpass, whether Ducheneaux had actually set up spikes there, or where Ducheneaux was positioned beneath the overpass. After Mullenix fired, Leija's car continued north, engaged the spike strip, hit the median and rolled two and a half times. In the aftermath of the shooting, Mullenix remarked to his supervisor,

Sergeant Byrd, "How's that for proactive?" Mullenix had been in a counseling session earlier that same day, during which Byrd intimated that Mullenix was not being proactive enough as a Trooper.

Leija was pronounced dead soon after the shooting. The cause of death was later determined to be one of the shots fired by Mullenix that had struck Leija in the neck. The evidence indicates that at least four of Mullenix's six shots struck Leija's upper body, and no evidence indicates that Mullenix hit the vehicle's radiator, hood or engine block.

The incident was investigated by Texas Ranger Jay Foster. Foster concluded that Mullenix complied with DPS policy and Texas law. The DPS Firearms Discharge Review board reviewed the shooting and concluded that Mullenix complied with DPS policy and Texas law. A grand jury declined to return an indictment of Mullenix. A DPS Office of the Inspector General ("OIG") Report concluded the opposite, that Mullenix was not justified and acted recklessly. The parties disputed the relevance and admissibility of that OIG report, which was subsequently called into question by its author, who testified that he did not have full information on the incident or investigation when he wrote the report. The district court mentioned the report in its statement of facts, but did not further discuss the report.

Beatrice Luna, as the representative of Leija's estate, and Christina Flores, on behalf of Leija's minor child, sued DPS, the Director of DPS Steve McCraw, Trooper Rodriguez, and Trooper Mullenix, in state court, asserting claims under the Texas Tort Claims

Act and 42 U.S.C. § 1983. Defendants removed to federal court. Director McCraw's Motion to Dismiss was granted, and plaintiffs' stipulation of dismissal against DPS and Trooper Rodriguez was granted with prejudice. The sole remaining claim is the § 1983 claim against Mullenix, alleging that he subjected Leija to an unconstitutional use of excessive force in violation of the Fourth Amendment. Mullenix answered and asserted the defense of qualified immunity. After discovery, Mullenix moved for summary judgment on the issue of qualified immunity. On August 7, 2013, the district court issued a memorandum opinion and order denying Mullenix's motion for summary judgment. Mullenix appeals.

II. Discussion

The doctrine of qualified immunity shields "government officials performing discretionary functions ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In reviewing a motion for summary judgment based on qualified immunity, we undertake a two-step analysis. First, we ask whether the facts, taken in the light most favorable to the plaintiffs, show the officer's conduct violated a federal constitutional or statutory right. *See Tolan v. Cotton,* —— U.S. ——, 134 S.Ct. 1861, 1865, 188 L.Ed.2d 895 (2014); *Flores v. City of Palacios,* 381 F.3d 391, 395 (5th Cir.2004) (citing *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Second, we ask "whether the de-

fendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Flores*, 381 F.3d at 395 (internal quotation marks omitted) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)); *see Tolan*, 134 S.Ct. at 1866. We may examine these two factors in any order. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (overruling in part *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Claims of qualified immunity must be evaluated in the light of what the officer knew at the time he acted, not on facts discovered subsequently. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 411 (5th Cir.2009). As the Supreme Court has recently reaffirmed, "in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan*, 134 S.Ct. at 1863 (internal quotation marks and alteration omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Our jurisdiction to review a denial of a motion for summary judgment based on qualified immunity is limited to legal questions. *See, e.g., Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir.2004) (en banc). Because of this jurisdictional limitation, "we consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Id.* at 348; *see Flores*, 381 F.3d at

394. We review the objective reasonableness of the defendant government official's actions and the scope of clearly established law de novo. *See Flores*, 381 F.3d at 394. We "may review the district court's conclusion that issues of fact are material, but not the conclusion that those issues of fact are genuine." *Id.*

A. Constitutional Violation

Under the first prong of the qualified immunity analysis, the plaintiffs must produce facts sufficient to show that Mullenix's actions violated Leija's Fourth Amendment rights. *Tolan*, 134 S.Ct. at 1865; *Flores*, 381 F.3d at 395. "[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). To show a violation, the plaintiffs must produce facts sufficient to show that Leija suffered (1) an injury; (2) which resulted directly from a use of force that was clearly excessive to the need; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir.2000). "This is an objective standard: 'the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' " *Ramirez v. Knoulton*, 542 F.3d 124, 128–29 (5th Cir.2008) (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. 1865).

"There are few, if any, bright lines for judging a police officer's use of force; when determining whether an officer's conduct violated the Fourth Amendment, we must slosh our way through the factbound morass of reasonableness." *Lytle*, 560 F.3d at 411 (internal

quotation marks and alteration omitted) (quoting *Scott v. Harris*, 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)). "To gauge the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for force," paying "careful attention to the facts and circumstances of each particular case." *Flores*, 381 F.3d at 399. "The intrusiveness of a seizure by means of deadly force is unmatched." *Garner*, 471 U.S. at 9, 105 S.Ct. 1694; *see Flores*, 381 F.3d at 399. Balanced against this intrusion are "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Lytle*, 560 F.3d at 411.

When deadly force is used, it is clear that the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis. *See Plumhoff v. Rickard*, — U.S. ——, 134 S.Ct. 2012, 2021, 188 L.Ed.2d 1056 (2014) (concluding that deadly force was not objectively unreasonable where "it is beyond serious dispute that Rickard's flight posed a grave public safety risk"); *Scott*, 550 U.S. at 386, 127 S.Ct. 1769 (noting that the use of deadly force was not objectively unreasonable when "[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others"); *see also Garner*, 471 U.S. at 11, 105 S.Ct. 1694 ("Where the suspect poses no immediate threat to the officer ... the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); *Thompson v. Mercer*, 762 F.3d 433,

440 (5th Cir.2014) (noting that "the question is whether the officer had reason to believe, at that moment, that there was a threat of physical harm"); *Hathaway v. Bazany*, 507 F.3d 312, 320 (5th Cir.2007) (noting that the "reasonableness of an officer's use of deadly force is ... determined by the existence of a credible, serious threat to the physical safety of the officer or to those in the vicinity"); *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir.2001) ("The excessive force inquiry is confined to whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting Bazan."); *Vaughan v. Cox*, 343 F.3d 1323, 1330 (11th Cir.2003) ("Genuine issues of material fact remain as to whether [the suspects'] flight presented an immediate threat of serious harm to [the police officer] or others at the time [the officer] fired the shot.").

With regard to high-speed chases, the Supreme Court has held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott*, 550 U.S. at 386, 127 S.Ct. 1769; *see also Plumhoff*, 134 S.Ct. at 2021–22 (applying *Scott* to a case involving the shooting of a suspect in a high-speed chase). Likewise, this court has recently held that a sheriff who used an assault rifle to intentionally shoot a fleeing suspect as he approached in a truck, after a lengthy, dangerous chase, did not violate the Fourth Amendment. *Thompson*, 762 F.3d at 438. These cases, however, do not establish a bright-line rule; "a suspect that is fleeing in a motor vehicle is not so inherently

dangerous that an officer's use of deadly force is *per se* reasonable." *Lytle*, 560 F.3d at 416. Instead, *Scott*, *Plumhoff* and *Thompson* are simply applications of the Fourth Amendment's reasonableness requirement to particular facts. *See Plumhoff*, 134 S.Ct. at 2020–22; *Scott*, 550 U.S. at 382–83, 127 S.Ct. 1769; *Thompson*, 762 F.3d at 438. "Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable." *Lytle*, 560 F.3d at 415; *see Thompson*, 762 F.3d at 438.

Mullenix asserts that, as a matter of law, his use of force was not objectively unreasonable because he acted to protect other officers, including Officer Ducheneaux beneath the overpass and officers located further north up the road, as well as any motorists who might have been located further north. However, accepting plaintiffs' version of the facts (and reasonable inferences therefrom) as true, these facts are sufficient to establish that Mullenix's use of deadly force was objectively unreasonable. *See Newman v. Guedry*, 703 F.3d 757, 762 (5th Cir.2012) ("Mindful that we are to view the facts in a light most favorable to Newman, and seeing nothing in the three video recordings to discredit his allegations, we conclude, based only on the evidence in the summary-judgment record, that the use of force was objectively unreasonable in these circumstances."); *Haggerty v. Tex. Southern Univ.*, 391 F.3d 653, 655 (5th Cir.2004) ("In an interlocutory appeal in which the defendant asserts qualified immunity, to the extent that the district court found that

genuine factual disputes exist, we accept the plaintiff's version of the facts (to the extent reflected by proper summary judgment evidence) as true."); *see also Tolan*, 134 S.Ct. at 1863 ("[I]n ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.").

Many of the facts surrounding Leija's flight from police, viewed in the light most favorable to the plaintiffs, negate the risk factors central to the reasonableness findings in cases like *Scott*, *Plumhoff* and *Thompson*. According to the plaintiffs' version of the facts, although Leija was clearly speeding excessively at some times during the pursuit, traffic on the interstate in the rural area was light. There were no pedestrians, no businesses and no residences along the highway, and Leija ran no other cars off the road and engaged no police vehicles. Further, there is evidence showing that Leija had slowed to 85 miles per hour prior to the shooting. Spike systems, which could have ended the pursuit without resort to deadly force, had already been prepared in three locations ahead of the pursuit. In *Scott* and *Plumhoff*, on the other hand, multiple other methods of stopping the suspect through alternate means had failed, the suspects were traveling on busy roads, had forced multiple other drivers off the road, had caused collisions with officers or innocent bystanders, and at the time of the shooting were indisputably posing an immediate threat to bystanders or other officers in the vicinity. *See Plumhoff*, 134 S.Ct. at 2017–18, 2021–22; *Scott*, 550 U.S. at 379–80, 383–84, 127 S.Ct. 1769. Likewise, in *Thompson*, this court found that the officers had tried "four

times" to stop the chase with "alternate means of seizure before resorting to deadly force" to stop a driver who posed "extreme danger to human life." *Thompson*, 762 F.3d at 438, 440. The *Thompson* court explained that

> even the Thompsons concede that their son represented a grave risk when he "reached speeds exceeding 100 miles per hour on the interstate, when he ran numerous stop signs, when he had 'recklessly' driven on the wrong side of the road, [and] when he avoided some road spikes [and] took officers down Blue Flat Road where a horse was loose." Indeed, parts of the police camera footage might be mistaken for a video game reel, with Keith disregarding every traffic law, passing other motorists on the left, on the right, on the shoulder, and on the median. He occasionally drove off the road altogether and used other abrupt maneuvers to try to lose his pursuers. The truck was airborne at least twice, with Keith struggling to regain control of the vehicle. In short, Keith showed a shocking disregard for the welfare of passersby and of the pursuing law enforcement officers.

Id. at 438.

To the extent that we must view facts in accordance with the video, *see Scott*, 550 U.S. at 378–80, 127 S.Ct. 1769; *Thompson*, 762 F.3d at 439, the video supports the plaintiffs' version of the facts. In *Scott*, the plaintiff argued that the force used was unreasonable because the driver posed "little, if any actual threat to pedestrians or other motorists." *Scott*, 550 U.S. at 378, 127 S.Ct. 1769. However, the Court said,

> [t]he videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379–80, 127 S.Ct. 1769. The Court relied on the video to resolve disputed facts, holding that the video "blatantly contradicted" the plaintiff's version of the facts, "so that no reasonable jury could believe it." *Id.* at 380, 127 S.Ct. 1769. Likewise, in *Thompson*, the plaintiffs argued that the threat posed by the chase had ended because the rural road was empty by the time of the shooting, but this court found that "the Thompsons' characterization of the scene is belied by the video evidence," which showed multiple cars pulling over to avoid the chase, and dangerous conditions on the road, which had limited visibility and no shoulder for cars to pull onto. *Thompson*, 762 F.3d at 439. Here, however, the video supports the plaintiffs' assertions that during the pursuit, traffic on the divided

highway was light, there were no pedestrians, businesses or residences along the highway, and Leija ran no other cars off the road and did not engage any police vehicles.

Further, in concluding that the use of force was not objectively unreasonable, the *Thompson* opinion relies repeatedly on the fact that the officers had made four attempts to disable the vehicle with "alternate means of seizure before resorting to deadly force." *Thompson*, 762 F.3d at 438, 440. With regard to the existence of a Fourth Amendment violation, the holding of *Thompson* is that "after multiple other attempts to disable the vehicle failed, it was not unreasonable for Mercer to turn to deadly force to terminate the dangerous high-speed chase." *Id.* at 438. The opinion later similarly concludes that "law enforcement reasonably attempted alternate means of seizure before resorting to deadly force," *id.* at 440, and discusses this fact twice in its discussion of whether the law was sufficiently clearly established, *id.* at 440–41. In the instant case, there were spikes already in place under the bridge, and officers prepared to deploy spikes in two additional locations up the road. Yet Mullenix fired his rifle at Leija's vehicle before Leija had encountered any of the spikes. In contrast to *Thompson*, the alternative methods of seizure that were already prepared were never given a chance to work before Mullenix resorted to deadly force.

We certainly do not discount Leija's threats to shoot officers, which he made to the Tulia dispatcher and which were relayed to Mullenix and other officers. However, allegedly being armed and in a car fleeing are not, by themselves, sufficient to establish that

Leija posed such an imminent risk of harm that deadly force was permitted. In a case involving the shooting of a suspect, we have stated that the "core issue" is "whether the officer reasonably perceived an immediate threat." *Reyes v. Bridgwater*, 362 Fed.Appx. 403, 408 (5th Cir.2010). "[T]he focus of the inquiry is the act that led the officer to discharge his weapon." *Id.* at 406 (internal quotation marks and alteration omitted) (quoting *Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir.2009)); *see also Bazan*, 246 F.3d at 493 ("The excessive force inquiry is confined to whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting."). The factual scenario here is substantially different, in terms of the imminence and immediacy of the risk of harm, from situations where we have granted qualified immunity to officers who shot an armed suspect, or a suspect believed to be armed. *See Ramirez*, 542 F.3d at 127, 129 (suspect stopped by the side of the road after a brief chase displayed a gun, repeatedly ignored police commands, was located yards from police officers, and brought his hands together in a manner that indicated he may have been reaching for the gun, prompting officer to shoot him); *Ballard v. Burton*, 444 F.3d 391, 402–03 (5th Cir.2006) (mentally disturbed suspect "refused to put down his rifle, discharged the rifle into the air several times while near officers, and pointed it in the general direction of law enforcement officers"); *Reese v. Anderson*, 926 F.2d 494, 500–01 (5th Cir.1991) (suspect stopped after a high-speed chase refused to exit the car, refused to follow police commands, repeatedly raised and lowered his hands, turned away from the officer and reached

lower toward the floorboard, prompting the officer to shoot him); *compare Reyes*, 362 Fed.Appx. at 407 (fact issue precluded qualified immunity where suspect was armed with a knife, but made no threatening gesture or motion), *with Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir.2014) (qualified immunity granted to officer where video confirmed that suspect "was standing up out of bed and had raised the knife above his head at the time the shots were fired"). We discuss these cases not because we hold that an officer must actually see a weapon before taking action to protect himself or others from the suspect, but because they illustrate that, even when a weapon is present, the threat must be sufficiently imminent at the moment of the shooting to justify deadly force.

In *Thompson*, the court did note the existence of a stolen gun in the car of the fleeing suspect as a fact that supported its conclusion that the suspect posed an "ongoing threat of serious harm," even though the officer had no way of ascertaining whether the suspect intended to use the weapon. *Thompson*, 762 F.3d at 439 (quotation omitted). However, in *Thompson*, the officer also knew at the time of the shooting that the suspect was fleeing in a stolen car with a stolen weapon, had abducted a woman during his flight, and that the "unidentified suspect was admittedly suicidal and had already acted with utter desperation in attempting to evade law enforcement." *Id.* Thus, the court found that the officer was "justified in assuming" that the presence of the stolen weapon contributed to the continuing threat posed by suspect. *Id.*

Here, although Leija had stated to the dispatcher that he was armed and would shoot officers, he was

not fleeing the scene of a violent crime, no weapon was ever seen, and at the time of the shooting, most officers and bystanders were miles away, where they would not have been encountered until after the spikes were given a chance to stop the chase. On appeal, Mullenix relies heavily on the presence of Ducheneaux beneath the overpass, and the risk that Leija could shoot Ducheneaux as he sped by. However, he also testified that he did not actually know Ducheneaux's position or what he was doing beneath the overpass.[2] Mullenix argues that he knew that an officer had to be positioned near a roadway to deploy spikes, but the facts, taken in the light most favorable to the plaintiffs, also show that officers were trained to deploy spikes in a location where they were able to take a protective position, that there were several pillars at the Cemetery Road overpass and that Ducheneaux had positioned himself behind a pillar as he was trained to do. Further, just prior to the shooting, Sheriff's Deputy Shipman mentioned Ducheneaux's presence beneath the overpass, and Mullenix replied only that he did not think *he* would hit Mullenix; he did not indicate that he perceived a threat to Ducheneaux from Leija. In this situation, the facts, viewed

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[2] We do not hold that an officer must necessarily have another officer that he believes to be in danger in his sightline at the time he takes action. We merely state that the facts, viewed in favor of the plaintiffs, are sufficient to show that Mullenix-positioned atop a bridge in the dark of night, and eventually out of contact with other officers-lacked sufficient knowledge to determine whether or not Ducheneaux was in immediate danger from Leija, or whether Mullenix's own actions were decreasing the risk to Ducheneaux.

in the light most favorable to the plaintiffs, do not establish that Mullenix reasonably perceived an immediate threat at the time of the shooting, sufficient to justify the use of deadly force.

The plaintiffs also point to evidence in the record showing that Mullenix heard the warning that Leija had said he had a gun six minutes before the shooting, and went to the bridge and waited three minutes for Leija's car to approach. During this period Mullenix had time to consider his approach, including time to ask for his supervisor's opinion, inform Rodriguez of his intentions, and discuss the feasibility of shooting the car with Shipman. This is not the type of "split-second judgment" that officers must make when faced with an imminent risk of harm to themselves or others. *See Plumhoff,* 134 S.Ct. at 2020; *Graham,* 490 U.S. at 396–97, 109 S.Ct. 1865; *Hathaway,* 507 F.3d at 320–21. Although Mullenix relies heavily on the assertion that it is up to the "officer on the scene" to make judgments about the use of deadly force, Mullenix was not the only, or even the primary, officer on the scene. Officer Rodriguez was immediately in pursuit of Leija, and multiple other officers from various law enforcement agencies were on the scene at Cemetery Road and were at multiple locations further north along I–27, planning to deploy tire spikes to stop the suspect. There is no evidence that any other officer from any of the law enforcement agencies involved in the pursuit, hearing the same information that Mullenix heard, including the information regarding Leija's threats, decided that deadly force was necessary or warranted. Further, via the dispatcher, Mullenix asked his supervisor, Sergeant Byrd, about his

plan to shoot at the car. It is undisputed that Sergeant Byrd advised Mullenix to "stand by" and "see if the spikes work first." While Mullenix contends he did not hear his supervisor's command to stand by, plaintiffs proffered evidence that he could have heard that command. If plaintiffs' evidence is taken as true, it supports the conclusion that Mullenix acted objectively unreasonably. Lastly, Mullenix testified that he intended to shoot the engine block of the car in an attempt to disable it, although there is no evidence that shooting at the engine is a feasible method of immediately disabling a car. His justification for the use of force was to disable the car, but alternative methods were already in place to achieve the same goal, undermining the asserted necessity for resorting to deadly force at that particular instant.

We conclude that the plaintiffs have produced facts that, viewed in their favor and supported by the record, establish that Mullenix's use of force at the time of the shooting was objectively unreasonable under the Fourth Amendment.

B. Clearly Established Law

Under the second prong of the qualified immunity analysis, plaintiffs must show that Mullenix's actions violated a constitutional right that was sufficiently clearly established. *Flores*, 381 F.3d at 395. For a right to be clearly established, "[t]he contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against

the backdrop of the law at the time of the conduct." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). "The central concept [of the test] is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.' " *Kinney*, 367 F.3d at 350 (quoting *Hope*, 536 U.S. at 740, 122 S.Ct. 2508). Further, while the Supreme Court has stated that "courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case,' " it has also recently reminded us that we "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan*, 134 S.Ct. at 1866 (quoting *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151).

While Mullenix devotes the bulk of his argument to this prong of the qualified immunity analysis, "We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle*, 560 F.3d at 417. "This holds as both a general matter and in the more specific context of shooting a suspect fleeing in a motor vehicle." *Id.* at 417–18 (internal citations omitted) (citing *Kirby v. Duva*, 530 F.3d 475, 484 (6th Cir.2008); *Vaughan*, 343 F.3d at 1332–33); *see also Sanchez v. Fraley*, 376 Fed.Appx. 449, 452–53 (5th Cir.2010) (holding that "it was clearly established well before [April 23, 2007] that

deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," and "the threat of serious harm must be immediate"); *Reyes*, 362 Fed.Appx. at 406 ("Unlike some areas of constitutional law, the question of when deadly force is appropriate—and the concomitant conclusion that deadly force is or is not excessive—is well-established.").

Mullenix points to the Supreme Court's recent decision in *Plumhoff* to argue that the law was not clearly established. The *Plumhoff* Court relied primarily on *Brosseau*, which held that as of 1999 it was not clearly established that it was objectively unreasonable force "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Brosseau*, 543 U.S. at 195–97, 200, 125 S.Ct. 596. However, *Plumhoff* holds only that where a fleeing suspect "indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby," a police officer's use of deadly force is not clearly established as unreasonable. *Plumhoff*, 134 S.Ct. at 2021–22, 2023; *see Brosseau*, 543 U.S. at 200, 125 S.Ct. 596. It does not, however, undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders. *See Lytle*, 560 F.3d at 417–18. *Thompson* is no different. Similar to *Plumhoff*, it holds that the officer's use of force to stop a high-speed chase was not clearly established as unreasonable where the fleeing suspect had stolen a car and kidnapped a woman, had evaded four attempts to

stop the car with alternate methods of seizure, and whose driving continued to pose a "tremendous risk" to the public and other officers. *Thompson*, 762 F.3d at 440–41.

At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment.[3]

III. Conclusion

For the foregoing reasons, we AFFIRM the denial of summary judgment.

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[3] Mullenix makes a separate argument that the district court relied on inadmissible summary judgment evidence, specifically the OIG report concluding that Mullenix's actions were not justified. This report was later called into question by its author, who testified that it was not based on a full review of the incident. However, there is no indication in the district court's order that it relied on the OIG report in denying summary judgment, and we likewise do not rely on it. If there are questions as to its admissibility, the district court can resolve those in due course as the litigation proceeds.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

BEATRICE LUNA, Individually and as Representative of the Estate of ISRAEL LEIJA, JR., Deceased, and CHRISTINA MARIE FLORES, as Next Friend of J.L.L. and J.V.L., Minor Children,	§	
	§	CIVIL ACTION
PLAINTIFFS,	§	CAUSE NUMBER
vs.	§	
	§	2:12-CV-152-J
DPS TROOPER CHADRIN LEE MULLENIX, in his Individual Capacity,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A total of six rifle rounds were filed by Texas Department of Public Safety Trooper Chadrin Lee Mullenix at a fleeing automobile driven by Israel Leija, Jr., who died as a direct result of multiple wounds from that gunfire. Defendant Mullenix moves for summary judgment in this civil rights case on the basis of qualified immunity. The Plaintiffs and the Defendant have also filed counter-motions raising objections to

all or parts of certain filed summary judgment exhibits.

Background Facts

On the evening of March 23, 2010.[1] Sgt. Randy Baker of the Tulia, Texas, Police Department was searching for Israel Leija, Jr. to serve a misdemeanor arrest warrant on Leija. At approximately 10:21 p.m., Baker spotted Leija's car at a Sonic Drive In and moved to effect an arrest. Baker approached Leija's vehicle and informed Leija that he was under arrest. Leija, who was never taken into custody, fled the scene and headed north towards Interstate Highway Number 27 (I–27), with Baker in pursuit. Texas DPS Trooper Gabriel Rodriguez joined in the pursuit, taking the lead.

At approximately mile marker 77 of I–27, Leija entered a rural stretch of I–27 and began heading north on I–27, with Rodriguez directly behind him in pursuit. During the approximately 18 minutes that the pursuit lasted, Rodriguez followed Leija, capturing the pursuit on his video recorder.[2] Traffic on the dry roadway was light.

The pursuit proceeded north on I–27 at speeds up to 110 mph. During the entire pursuit, Leija remained on the paved portion of the road with his headlights on. Although Leija did exceed the speed limit and did

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[1] The Court notes that the pleadings state two different dates on which the police shooting occurred—March 23, 2010, and October 23, 2010. Defendant Mullenix agreed in his deposition that the shooting occurred on the evening of March 23, 2010.

[2] Copies of police videos are included in Plaintiffs' filed Appendix as exhibits.

refuse to stop, he did not run any vehicles off the roadway, did not collide with any vehicles, and did not cause any collisions. There were no pedestrians along the route that were in danger of being hit by Leija, and no disabled vehicles. All of the pursuit occurred in rural areas. There were no businesses or residences located in proximity to the controlled-access interstate highway. The roadway was divided by a wide center median, mostly flat, dry, and the weather that night was good.

During the pursuit, Leija twice called the Tulia Police Dispatch on his cell phone. Leija claimed that he had a gun, and that he would shoot at a police officer if they didn't back off. Leija in fact had no weapon in his possession, which would later be confirmed by law enforcement.

As the pursuit headed north on I–27, other law enforcement units joined in. Officer Troy Ducheneaux of the Canyon, Texas, Police Department deployed tire spikes underneath the overpass at Cemetery Road and I–27, about mile marker 103. Troopers Chris Ecker and Dennis Brassfield set up spikes at McCormick Road, which was north of Cemetery Road. Other police units set up spikes at a location further north, for a total of at least three spiking locations on I–27 ahead of Leija.

DPS Trooper Chadrin Mullenix also responded to the pursuit. With knowledge that other units were setting up spikes at other locations, *possibly* including underneath the Cemetery Road overpass, Mullenix decided not to deploy his spike system. Instead, Mullenix positioned his vehicle atop the Cemetery Road

bridge, about twenty feet above the I–27 roadway. Mullenix testified in his deposition that he intended to shoot down at Leija's moving vehicle as it approached, hoping that he could use his .223 caliber M–4 rifle to take out the engine block of the vehicle.[3] Mullenix testified that he had never attempted such a shot before, had not been trained for it, and had never seen such a tactic done. He testified that he had, however, been trained in shooting upwards, at moving clays, with a shotgun.

Mullenix testified that he contacted his Amarillo DPS dispatch to ask them to contact his supervisor, DPS Sgt. Robert Byrd, to—Plaintiffs' allege—"request permission" to fire at the vehicle. Mullenix denies that he requested "permission." He alleges that he did not need anyone's "permission" before he fired because, under DPS policy and the specific circumstances at that place and time, the decision to fire was up to him and him alone.

In any event, not waiting in his vehicle on a response from Sgt. Byrd, Mullenix exited his patrol vehicle, closed his car door, opened his trunk, took out his rifle, left the trunk lid open, and took a shooting position above the edge of the grassy median, near the center of the Cemetery Road bridge, on the South side. Mullenix crouched behind the concrete bridge's railing, waiting for the pursuit to arrive at his location.

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[3] There is no evidence in this record about the metal composition, type, weight in grains, or power of the ammunition used by Mullenix, or the metal composition of the engine block in Leija's vehicle. There is no evidence—one way or another—that any attempt to shoot out an engine block moving at 80 mph could possibly have been successful.

During this time, DPS dispatch responded that Sgt. Byrd declined to give permission to shoot, but instructed instead for Mullenix to wait and give the spikes a chance to work.

Mullenix alleges that he was unable to hear that instruction because he had failed to turn his outside loudspeakers on, thereby placing himself out of communication with his dispatch for the time that it took the pursuit to arrive at his location. Mullenix did have his radio microphone on him. During the waiting minutes, Mullenix had a recorded radio conversation with Randall County Sheriff's Deputy Tom Shipman about whether Mullenix could disable the vehicle by shooting it, and how and where to shoot the vehicle to best accomplish disabling it. Nearby, north of and below Mullenix, was Officer Ducheneaux's police vehicle, which did have its external loudspeakers turned on. Plaintiffs allege that because Mullenix's trunk was open he should have been able to hear his police radio, even though his car doors were closed and his external loudspeakers were not turned on. Plaintiffs further allege that Mullenix should have been able to hear on Ducheneaux's police radio the order not to fire on Leija.

Mullenix testified that he had a clear view towards the south and was able to make out the headlights of Leija's vehicle, with Rodriguez in pursuit, as they crested a low rise south of the Cemetery Road overpass. Because of the darkness, Mullenix was unable to see any actions of Leija, anything within his vehicle, or see whether there were other people inside of the vehicle. He assumed that there were no other persons inside the vehicle because, he testified, if there

were Officer Rodriguez probably would have told him about them. Rodriguez testified that he could only see the back of Leija's head and hands as Rodriguez followed in pursuit.

As the two vehicles approached, Mullenix pointed his rifle down onto Leija's vehicle and fired six rounds as the vehicle closed the gap towards the overpass. There is no testimony in this record where any of the six shots landed, except for the round or rounds which penetrated the windshield and killed Leija. There is no evidence that Mullenix hit the vehicle's radiator, hood or engine block. There is evidence that he hit Leija's upper body with four or more of his six shots.

After Leija's vehicle passed underneath the overpass, engaging the tire spike strip deployed there by Officer Ducheneaux, Leija's vehicle went out of control, rolling into the center median north of the overpass. There is evidence that, unknown to Officer Mullenix when he fired, there were at least two vehicles passing in the southbound lanes of the interstate at this time. During the incident, Officer Ducheneaux's vehicle was parked on the center median on the north side of the bridge.

Leija was pronounced dead a short time later. The cause of death was determined to be one or more of the shots fired by Mullenix that had fatally struck Leija in the neck, shoulder, upper arm, and possibly in his face. Subsequent examination of the crime scene by the DPS accident team revealed that Leija did not have a firearm inside his vehicle, and that Leija had not recently fired a firearm.

In the immediate aftermath of the shooting, Mullenix remarked to his supervisor, Sgt. Byrd, "How's that for proactive?" Mullenix's comment referred to a counseling session earlier in the same evening, during which Mullenix had been counseled, encouraged and/or criticized by Byrd for not being "proactive" enough as a Trooper. Byrd acknowledged that Mullenix had been having personal difficulties around this time, and that Mullenix was failing to live up to Byrd's expectations of how a DPS Trooper should be doing his job.

Defendant Mullenix testified in his deposition that, as of March 23, 2010, he had never met Leija, did not have any knowledge about Leija's criminal record, had no information that Leija had ever committed a violent crime or a felony, and did not personally know Leija. Mullenix testified that he did not know what the arrest warrant for Leija was for, but did know that an arrest warrant existed and that Leija was fleeing arrest. He testified that he had no information, at the time of the shooting, to lead him to believe that Leija was suicidal in any way. He did know that Leija was speeding, had told the Tulia dispatcher that he had a weapon with him in the car, and had been informed that Leija might be intoxicated.

A subsequent DPS review of the incident by the Office of Inspector General concluded that the claim by Trooper Mullenix that he used his firearm as a tool to disable Leija's vehicle was not justified given the high speed of the fleeing vehicle, the elevated position Mullenix chose to deploy, the amount of time Mullenix took to discuss using his firearm with Trooper Rodri-

guez and Deputy Shipman, and Mullenix's conversation with the DPS communications operator to request permission to shoot at Leija's vehicle. The DPS IG concluded that the evidence did not justify Mullenix's actions, and that the firearm discharge was reckless and without due regard for the safety of Canyon PD Officer Ducheneaux or Leija. The IG concluded that the evidence did not justify the use of deadly force, and that a classification of "Not Justified" was appropriate. *See* Plaintiff's Appendix Exhibit 7. The Defendant argues that the IG's conclusions are based upon inadequate information, are not reliable, are not relevant, are not properly authenticated, lack foundation, and should be ignored.

Legal Standards

A motion for summary judgment should be granted if the movant shows that there is no genuine issue as to any material fact. Fed. R. Civ. Pro. 56(a). A party who moves for summary judgment has the burden of identifying the parts of the pleadings and discovery on file that, together with any affidavits, show the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmovant must set forth specific facts that show a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To determine whether a genuine issue of material fact exists, courts must resolve all ambiguities of fact in favor of the nonmoving party. *Id.* Summary judgment is mandated if the nonmovaant fails to sufficiently establish the existence of an element essential to her case on which

she bears the burden of proof at trial. *Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S.Ct. 1689, 123 L.Ed.2d 317 (1993); *Celotex Corp.*, 477 U.S. at 322; *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 110 (5th Cir.2005); *Patrick v. Ridge*, 394 F.3d 311, 315 (5th Cir.2004).

Qualified Immunity

Qualified immunity is a defense that protects government officials from suit when they exercise the discretionary functions of their office. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In order to overcome a defense of qualified immunity, a plaintiff must establish that: "(1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established at the time of the challenged conduct." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir.2011) (citing *Ashcroft v. al-Kidd*, — – U.S. ——, ——, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011)). The court may examine these factors in any order. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (*overruling in part Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). It is the Plaintiffs' burden to present evidence that a defendant is not entitled to qualified immunity when the defense is raised. *See Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir.2001).

Claims of qualified immunity are not judged on twenty-twenty hindsight, or in light of knowledge ascertained after an event, but by looking through the eyes of the officer, considering what that officer knew about the situation at the time force was used. *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S.Ct. 1865,

104 L.Ed.2d 443 (1989); *Poole v. City of Shreveport*, 691 F.3d 624, 630 (5th Cir.2012).

Constitutional Violation

The use of deadly force for apprehension is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner*, 477 U.S. 1, 7, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1985). To support an allegation of excessive force, a plaintiff must show, "(1) an injury, (2) which resulted directly and only from the use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 382 (5th Cir.2009) (citing *Freeman v. Gore*, 483 F.3d 404, 410 (5th Cir.2007). When examining whether the excessiveness was clearly unreasonable, a court should consider, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The immediacy of the threat and the reasonableness of the use of force are contested in this case.

Objective Unreasonableness

The Court must also consider whether the Defendant's use of force, though a violation of the Fourth Amendment, was nevertheless objectively reasonable in light of clearly established law at the time the challenged conduct occurred. *Bush v. Strain*, 513 F.3d 492, 501 (5th Cir.1998). "The central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long

as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.' " *Id.* at 502 (citing *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir.2004) (*en banc*) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002))). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 471 U.S. 386, 396–7, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1989). An officer's use of deadly force is reasonable against a moving vehicle when there exists "a credible, serious threat to the physical safety of the officer or to those in the vicinity." *Hathaway v. Bazany*, 507 F.3d 317 (5th Cir.2007). In *Tennessee v. Garner*, the Supreme Court determined that "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable ... where the suspect poses no immediate threat to the officer and no threat to others." *Tennessee v. Garner*, 471 U.S. at 11.

Discussion and Analysis

The Court has considered the contested exhibits only to the extent that they are competent summary judgment evidence. The Court notes that many of the specific facts alleged by the Defendant to be "undisputed" are, in fact, strongly disputed, are speculative, are questions of reasonable interpretation for a jury, and/or are genuine issues of disputed material facts.

It was clearly established law as of March 23, 2010 that a police officer's use of deadly force is justified

only if a reasonable officer in Defendant Mullenix's position had cause to believe that there was an immediate threat of serious physical harm or death to himself which Officer Mullenix has testified did not exist in this case—or there existed at the time of the shooting an immediate threat of serious physical harm or death to others. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). Defendant Mullenix testified during his deposition that he believed he was justified in firing on Leija because he believed there was a risk of serious injury or death to other officers, either the officer he did not see but thought might be somewhere under the Cemetery Road bridge, or to other officers further up the interstate who were setting out tire spikes, or even possibly to innocent bystanders in the cities of Canyon or Amarillo, if Leija traveled that far north.

As to the existence of an immediate risk of serious injury or death to other officers or to innocent bystanders, the summary judgment evidence in this case presents genuine issues of material fact as to whether that risk did, or did not, exist. Trooper Mullenix testified that he thought an officer was somewhere under the bridge because he saw a patrol car down there, with its overhead lightbar flashing. He did not believe Officer Ducheneaux was there, because he thought Ducheneaux was further north setting out tire spikes. Mullenix testified that he did not know who down there, or where the unknown officer was located at the time, and that he did not know whether he or she was inside or outside their patrol car or behind a bridge pillar. Mullenix testified, however, that he discharged his rifle to protect the unknown officer from possibly

being fired upon by Leija as he drove by at 80 or so miles per hour, and to protect other persons Mullenix believed were farther north in possibly vulnerable positions.

There are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances. Plaintiffs have tendered evidence raising the issue whether a reasonable officer would not have fired because of the possibly resulting increased risk to persons traveling southbound on I–27 at the time, or to Officer Ducheneaux. The evidence in the record raises the issue whether Mullenix was justified in his decision to fire six times upon Israel Leija, Jr., or whether a reasonable officer would not have fired at all given Mullenix's lack of relevant training and the caliber of weapon he utilized for this attempted stop. There are genuine issues of material fact as to whether Mullenix did or did not hear, and should have obeyed, the instructions from his superior officer to let the other officers responding to the situation first try the planned non-lethal or less-dangerous methods being utilized to end the high-speed pursuit. There also exist genuine questions of material fact as to the existence of any *immediate* threat to officers involved in the pursuit, including Officers Ducheneaux or Rodriguez, or an immediate threat to other persons who were miles away from the location of the shooting at issue in this case.

Conclusions

For all of the foregoing reasons, summary judgment can not be granted on the specific facts of this case. Defendant's motion for summary judgment is

therefore denied.

This is not to be construed as a ruling that any summary judgment exhibit is or is not admissible as a trial exhibit. The Court will consider objections to trial exhibits when and if the specific exhibits or portions thereof are offered at trial, and proper objections are timely made.

It is SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13–10899

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2014

Lyle W. Cayce
Clerk

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs–Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant–Appellant

Appeal from the United States District Court for the Northern District of Texas, Amarillo

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ON PETITION FOR REHEARING EN BANC

(Opinion August 28, 2014, 765 F.3d 531)

Before KING, HAYNES, and GRAVES, Circuit Judges.

ON PETITION FOR REHEARING EN BANC
PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 6 judges voted in favor of rehearing (Judges Jolly, Davis, Jones, Smith, Clement, and Owen), and 9 judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Elrod, Southwick, Haynes, Graves, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.

United States Circuit Judge

E. GRADY JOLLY, Circuit Judge, dissenting from the Denial of Rehearing En Banc, joined by KING, DAVIS, JONES, SMITH, CLEMENT and OWEN, Circuit Judges:

Certainly, I have great personal respect for all members of the instant panel. But, I will be candid: My impression is that the panel majority either does not understand the concept of qualified immunity or,

in defiance thereof, impulsively determines the "right outcome" and constructs an opinion to support its subjective judgments, which necessarily must ignore the concept and precedents of qualified immunity.

The concept of qualified immunity assumes that law enforcement officers want to respect the constitutional rights of citizens who violate the law or are suspected of violating the law. *Accord Ashcroft v. al-Kidd*, —— U.S. ——, 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments' and "protects all but the plainly incompetent or those who knowingly violate the law." (internal quotation marks and citation omitted)). For an officer to respect those constitutional rights, he must know or have reasonable understanding of what the legal standards are that govern his conduct. *Presley v. City of Benbrook*, 4 F.3d 405, 409 (5th Cir.1993) ("[T]he essence of qualified immunity [is] that an officer may make mistakes that infringe constitutional rights and yet not be held liable where, given unclear law or uncertain circumstances, it cannot be said that she knew she was violating a person's rights."). The only means for an officer to have that understanding is by notice of the law through the decisions of the courts. Officers cannot be held liable for a violation of legal standards when there are three or four versions of the law applicable to judging the officers' decisions and responses to criminal suspects, arrestees, or those committing crimes. *McClendon v. City of Columbia*, 305 F.3d 314, 332 (5th Cir.2002) (en banc) (Qualified immunity must be granted "if a reasonable official would be left

uncertain of the law's application to the facts confronting him."); *Del A. v. Edwards*, 855 F.2d 1148, 1150 (5th Cir.1988) ("When the law is unclear ... the official ... require[s] protection [in the form of qualified immunity] so that fear of suit will not cloud the decision-making process."). Consequently, the constitutional law must be clearly established so as to provide reasonable notice of an officer's duties to citizens. To give such required notice, the right at issue cannot be defined at a high level of generality if it is to have any meaning that serves the purpose of qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (warning that "if the test of 'clearly established law' were to be applied at [a high] level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of [qualified immunity and plaintiffs] would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."). Furthermore, qualified immunity recognizes that, even where constitutional rights are clearly established, an officer should not be liable for his conduct unless his conduct was unreasonable in the light of the clearly established law. *Accord Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.").

The initial task here is to define the clearly established law that governs the specific facts of this case. If such law cannot reasonably be defined, the inquiry

ends, and the officer is not liable because he had no notice of the rights that he was bound to respect. If there is clearly established law, the qualified immunity analysis then asks: given the factual situation the officer confronted, was his conduct unreasonable in the light of the clearly established law of which he reasonably had notice. This final question acknowledges that, on some occasions, the safety of the public or the safety of the officers and the safety of surrounding lives is so at risk that the officer must make a snap judgment that requires him to act notwithstanding the lapidary principles of the law at issue.

The panel majority regrettably has demonstrated its lack of grasp of these qualified-immunity principles in fundamental ways and has done so from the beginning of its efforts to decide this case, through its present unexplained and puzzling reversal of positions:

• At the outset, the majority was doggedly determined to send this case to a jury against all precedent and notwithstanding Judge King's clear—and unanswered—dissent. My impression is confirmed by the evolution of the majority's approach from its earlier opinion [1] to today's substitute. In the first version, the majority holds that a jury is needed to determine whether Mullenix's conduct was reasonable under the Fourth Amendment. In its new opinion, the majority nods to the need for a jury, but it

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[1] *Luna v. Mullenix*, 765 F.3d 531 (5th Cir.2014), vacated and replaced by *Luna v. Mullenix*, 773 F.3d 712 (5th Cir.2014). *Luna v. Mullenix*, 765 F.3d 531 (5th Cir.2014), vacated and replaced by *Luna v. Mullenix*, 773 F.3d 712 (5th Cir.2014).

proceeds to hold that not one of the facts supporting Mullenix's decision to disable Leija's car to prevent his continued threat to the police and the public is legally sufficient to render the shooting objectively reasonable under the Fourth Amendment. The panel's complete turnaround of its earlier dogmatic assertions, with no explanation, leaves the bench and bar to wonder: What is going on here? The confusing nature and unorthodox analysis of the opinion—both initially and on rehearing—will surely befuddle all readers; not the least, those officers who consider themselves familiar with the clearly established law of the Supreme Court and this Court.[2]

• The majority fails to recite or accept the clearly established law that applies to car-chase cases, and then dismissively states, "We need not dwell on this issue." "Dwelling" would have led to objective analysis of the relevant standard, articulated by the U.S. Supreme Court in *Scott v. Harris*, 550 U.S. 372, 386 [127 S.Ct. 1769, 167 L.Ed.2d 686] (2007) (holding in clear, easily understood language, "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious

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[2] Given the majority's conclusions on rehearing, it is hard to see what issues remain other than damages and attorney's fees. The majority moved from improperly committing a question of law to the jury to rendering, in essence, an unprecedented liability verdict against Mullenix. The majority's subjective view of the case is clear, but its legal analysis remains, at best, cloudy.

injury or death.").[3]

• The majority irrationally concludes that Trooper Mullenix's conduct was unreasonable—based on its own, subjective predilections, supported by arguments made of straw; in particular, that tire spikes should have been the preferred alternative means for stopping Leija's car.

• The majority fails to heed the Supreme Court's instruction to account for Leija's culpability.[4] It was Leija, after all, who placed himself and the public in danger when he fled arrest while intoxicated, traveled at excessive speeds for miles and miles, threatened to shoot officers in pursuit, and swerved around numerous vehicles. It was Leija's choices and actions—not Mullenix's—that led to his demise. Leija put innocent lives at risk; Mullenix responded and tried to restore public safety. The majority ignores Leija's culpability, making him an innocuous

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[3] *See also Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 581 (5th Cir.2009) ("Stuck between the choice of letting a presumptively intoxicated and reckless driver continue unabated or bumping the suspect off the road, [the officer] chose the course of action that would potentially save the lives of individuals who had no part in creating the danger. Although this choice ended tragically with [the driver's] death, the balancing test indicates that [the officer's] actions were reasonable.").

[4] *See Scott*, 550 U.S. at 384, 127 S.Ct. 1769 (stating that a court should "ta[ke] into account not only the number of lives at risk, but also their relative culpability"); *id.* ("It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [the officer] confronted.").

actor rather than a man bent on escape at all costs.[5]

• The majority views the facts of this case through hindsight, substituting its own notions for controlling precedent. In the Delphic milieu of an appellate court, the majority condemns Mullenix for his real-time decision to shoot at the car's engine block and proceeds to challenge his judgment for not waiting to see what, if any, effect the tire spikes might have on Leija's flight. In so doing, the majority fails to give Mullenix "breathing room to make reasonable but mistaken judgments" and, in so doing, strips him of the qualified immunity to which he is entitled.[6]

• The majority demonstrates a lack of understanding of qualified immunity and its purpose as set out by the Supreme Court: to "protect officers from the sometimes 'hazy border between excessive and acceptable force,' " especially when—as here, because the majority refused to accept the clearly established law governing car chases—officers lack notice that their conduct is clearly established as unconstitutional.[7] *See Carroll v. Carman*, [—— U.S. ——] 135 S.Ct. 348, 350 [—— L.Ed.2d ——] (2014) ("[E]xisting

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[5] *Id.* ("We have little difficulty in concluding it was reasonable for [the officer] to take the action that he did.").

[6] *Carroll v. Carman*, —— U.S. ——, 135 S.Ct. 348, 350, —— L.Ed.2d —— (2014) (quotation marks omitted).

[7] *Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) ("Qualified immunity operates ... to protect officers from the sometimes 'hazy border between excessive and acceptable force,' and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." (citation omitted)), *overruled in part by Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

precedent must have placed the statutory or constitutional question *beyond debate.*" (quotation marks omitted) (emphasis added)).

• As noted, the majority creates a phantom argument based on no record fact of any kind: that Mullenix chose "deadly force" when shooting at Leija's engine instead of choosing an alternate, non-deadly means for stopping the car. Even though the record does not begin to suggest, which alternative—bullets to the engine block or spikes to the tires—would have been less likely to produce a deadly result, the majority assumes an avuncular role and subjectively concludes, without any record support, that the tire spikes would have been the better choice. It then relies solely on that appellate post hoc unsupported opinion for its mantra that Mullenix made an unwise choice. Even more perfidious to the record, the majority repeats that Mullenix's plan was to shoot Leija himself. There was never such a plan. The plan was to shoot the engine block of the car. This unsupported, made up, shoot-to-kill "fact" reflects the reckless, unwarranted liberties that the majority takes to reach its predetermined "right result."

To comprehend how far the panel majority drifts from understanding that it is the *plaintiffs' burden* to show that Mullenix is *not* entitled to qualified immunity, one must only consider the undisputed facts that the majority attempted to avoid or to mitigate in its initial opinion and, now exposed, attempts to dismiss as inconsequential:

• Equipped with a warrant, an officer attempted to effect Leija's arrest at a Sonic Drive–In in Tulia,

Texas.

• Rather than submit to that arrest, Leija fled in his car at speeds up to 110 mph.

• His flight lasted approximately eighteen minutes and covered more than twenty-five miles of interstate, plus some distance over city streets in Tulia, Texas.

• Leija's flight took him past ten interstate on-ramps.

• Leija sped at times down the center of the road, with his car straddling the left and right lanes; he swerved between lanes; and he changed lanes without using his blinker.

• Leija raced past eight vehicles in the northbound lane of the interstate: four passenger vehicles, one bus, two tractor trailers, and one truck carrying a large trailer. Some of these vehicles were in the right-hand lane as Leija sped past; others were partially on the right shoulder, waiting for Leija to race by them. There were more than fifty cars in the southbound lane of the interstate. Many of these vehicles had to pull off the road to escape Leija's path.

• Leija plausibly was believed to be intoxicated.

• During the high-speed chase, Leija called the police dispatch officer two times. Both times, Leija said that he had a gun and that he would shoot any officer he saw if law enforcement did not stop its pursuit. The dispatch officer relayed these threats to the pursing officers, including Trooper Mullenix.

• Leija was rapidly approaching Officer Ducheneaux, Trooper Mullenix, and other officers on the scene.

• Leija's car, gun, and intoxication posed risks to Officer Ducheneaux, who was setting up tire spikes near Trooper Mullenix's location.

• Leija's gun and intoxication posed risks to Troopers Rodriguez, who was in the chase car, and Mullenix, who was exposed on the bridge.

• Mullenix intended to shoot down at Leija's car as it approached, hoping that he could use his rifle to take out the car's engine block.

• Trooper Mullenix relayed his plan to disable Leija's car to the driver of the chase car, Trooper Rodriguez. Rodriguez responded, "10–4."

• Mullenix also had a brief conversation with a deputy about whether Mullenix could disable Leija's car by shooting it and how and where to shoot the car to best accomplish disabling it.

• When he fired his weapon, Trooper Mullenix knew (1) a warrant was issued for Leija's arrest, (2) Leija was fleeing arrest at high speeds and had been fleeing arrest for some time, (3) Leija was believed to be intoxicated, (4) Leija had a gun and said he would shoot at any officer he saw, (5) Officer Ducheneaux was below Mullenix's position and in Leija's path, and (6) Trooper Rodriguez was following Leija in his patrol car.

The majority finds Leija's threats to public safety neither immediate nor imminent. So, under the majority's view, when, if ever, is an officer's conduct shielded by qualified immunity except to employ spikes on the highway? Speed is not a compelling factor, if traveling between 85 and 110 miles per hour is not enough. Nor is obvious danger to other motorists, given that Leija (1) passed eight other vehicles, including a passenger bus; (2) passed fifty cars in the oncoming lanes; (3) raced by ten on-ramps to communities unknown; (4) drove recklessly; and (5) was thought to be drunk. Imminent danger from repeated threats to shoot pursuing officers apparently adds nothing. Nor does peril to officers in chase cars or on roadways. Nor does the *collective* weight of these factors impress the majority as a significant danger to the safety of the officers and public.[8]

The panel's contrary conclusion makes it impossible for an officer to understand whether and when his decision to disable a fleeing suspect's car will expose him to personal liability. Through its misunderstanding and misstatement of binding precedent, the panel condones second-guessing of split-second decisions—

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[8] The panel further misunderstands binding precedent of the Supreme Court when the panel requires an immediate threat of harm before force can be used to stop high-speed flight. The Supreme Court expressly stated that there is no "magical on/off switch that triggers rigid preconditions [such as an imminent threat of harm] whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382, 127 S.Ct. 1769. Instead, the Court adopted a case-specific test of reasonableness: "[A]ll that matters is whether [an officer's] actions were reasonable." *Id.* at 383, 127 S.Ct. 1769.

in contravention to the principles of qualified immunity.

Finally, the only redeeming aspect of this opinion is that it is such an outlier and so contrary to previous precedents that it can, and will, be dismissed under our strict rule that one panel cannot overrule precedent of earlier opinions. *Ford v. Cimarron Ins. Co.*, 230 F.3d 828, 832 (5th Cir.2000) ("We are a strict *stare decisis* court. Thus, one panel of this court cannot disregard, much less overrule, the decision of a prior panel." (quotation marks omitted)).

Because our Court is derelict in failing to employ the en banc procedures to rid this outlier from the law books, I respectfully dissent from the decision to deny rehearing en banc.

KING, Circuit Judge, joining Judge Jolly's dissent from the denial of rehearing en banc:

Although I was a member of the panel in this case, I was not consulted when the panel majority decided to vacate its original opinion and to issue a new one. I do not join the new opinion.

As for the merits of the new opinion and the decision of the en banc court to deny rehearing en banc, I join Judge Jolly's opinion. I would point out that other law enforcement officers involved in this event thought it advisable to wait to see if the spikes worked. Mullenix voiced particular concern about Leija's threats to shoot officers and elected to try to shoot out the engine block of Leija's car and thereby end his dangerous flight. That may have been a mistaken judgment; in my view, it was not an unreason-

able one. But, as Judge Jolly points out, qualified immunity protects reasonable but mistaken judgments in an emergency situation like this one. As the law now stands, Mullenix was entitled to qualified immunity.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Seal]
Certified as a true copy and issued as the mandate on Jan 12, 2015

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2014
Lyle W. Cayce
Clerk

No. 13-10899

D.C. Docket No. 2:12-CV-152

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs-Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas, Amarillo

Before HAYNES and GRAVES, Circuit Judges.*

JUDGMENT ON PETITION FOR REHEARING EN BANC

This cause came on to be heard on rehearing en banc without oral argument.

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. Our prior opinion of August 28, 2014 is withdrawn; and it is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

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* Judge King, a member of the original panel in this case, did not participate in the consideration of this opinion. This matter is decided by a quorum. 28 U.S.C. § 46(d).

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-10899

United States Court
of Appeals
Fifth Circuit
FILED
August 28, 2014

Lyle W. Cayce
Clerk

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs–Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before KING, HAYNES, and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

This § 1983 excessive use of force case arises from the shooting and death of Israel Leija, Jr. by Texas Department of Public Safety (DPS) Trooper Chadrin Mullenix during a high-speed pursuit. The district court denied Mullenix's motion for summary judgment on the issue of qualified immunity, holding that multiple genuine disputes of material fact existed as to the qualified immunity analysis. We affirm.

I. Factual and Procedural Background

On March 23, 2010, at approximately 10:21 p.m., Sergeant Randy Baker of the Tulia Police Department followed Israel Leija, Jr. to a Sonic Drive–In to arrest him on a motion to revoke misdemeanor probation. The arrest warrant had been filed because (1) Leija had failed to complete all of his hours of community service, and (2) a new complaint of domestic violence had been filed against Leija, who was on probation. After some discussion with Baker, Leija fled the scene and headed north towards Interstate Highway 27 ("I–27"), with Baker in pursuit. Texas DPS Trooper Gabriel Rodriguez was on patrol nearby and took the lead in the pursuit. Around mile marker 77, Leija entered I–27 and continued north, with Rodriguez directly behind him. During the approximately 18 minutes that the pursuit lasted, Rodriguez followed Leija and captured the pursuit on his video recorder. The video supports the plaintiffs' assertions that although the pursuit proceeded north on I–27 at speeds between 80 and 110 miles per hour, traffic on the dry roadway was light; Leija remained on the paved portion of the road with his headlights on, did not run any vehicles off the road, did not collide with any vehicles,

and did not cause any collisions; there were no pedestrians or stopped vehicles along the road; and all of the pursuit occurred in rural areas, without businesses or residences near the interstate, which was divided by a wide center median.

As the pursuit headed north on I–27, other law enforcement units joined. Officer Troy Ducheneaux of the Canyon Police Department deployed tire spikes underneath the overpass at Cemetery Road and I–27. DPS Troopers set up spikes at McCormick Road, north of Cemetery Road. Other police units set up spikes at an additional location further north, for a total of three spike locations ahead of the pursuit. The record reflects that officers had received training on the deployment of spikes, and had been trained to take a protective position while deploying spikes, if possible, so as to minimize the risk posed by the passing driver.

During the pursuit, Læija twice called the Tulia Police Dispatch on his cell phone, claiming that he had a gun, and that he would shoot at police officers if they did not cease the pursuit. This information was relayed to all officers involved. It was discovered later that Leija had no weapon in his possession.

DPS Trooper Chadrin Mullenix was on patrol thirty miles north of the pursuit, and also responded. Mullenix went to the Cemetery Road overpass, initially intending to set up spikes at that location, but ultimately decided to attempt to disable the car by shooting it. He positioned his vehicle atop the Cemetery Road bridge, twenty feet above I–27, intending to shoot at the vehicle as it approached. Mullenix planned to use his .223 caliber M–4 rifle to disable the

vehicle by shooting at its engine block, although he had never attempted that before and had never seen it done before. The district court noted that "[t]here is no evidence—one way or another—that any attempt to shoot out an engine block moving at 80 mph could possibly have been successful." Mullenix testified that he had been trained in shooting upwards at moving objects, specifically clay pigeons, with a shotgun. He had no training on how to shoot at a moving vehicle to disable it.

Mullenix's dash cam video reflects that once he got to the Cemetery Road overpass, he waited for about three minutes for the pursuit to arrive. Mullenix relayed to Officer Rodriguez that he was thinking about setting up with a rifle on the bridge. Rodriguez replied "10–4," told Mullenix where the pursuit was, and that Leija had slowed down to 80 miles per hour. Mullenix then asked the Amarillo DPS dispatch to contact DPS Sergeant Byrd, Mullenix's supervisor, to tell Byrd that he was thinking about shooting the car and to ask whether the sergeant thought that was "worth doing." According to plaintiffs' allegations, he contacted Byrd to "request permission" to fire at the vehicle. Mullenix denies that he requested or needed "permission," but stated that he "asked for what [Byrd] advised" and asked to "get his advice." Mullenix did not wait for a response from Sergeant Byrd, but exited his patrol vehicle, took out his rifle, and took a shooting position on the bridge. During this time, the dispatcher relayed a response from Sergeant Byrd to "stand by" and "see if the spikes work first." Mullenix alleges that he was unable to hear that instruction because he had failed to turn on his outside loudspeakers, thereby

placing himself out of communication with his dispatch or other officers involved in the pursuit. Plaintiffs allege that since the trunk was open, Mullenix should have heard the response. Mullenix did have his radio microphone on him. During the waiting minutes, Mullenix had a short, casual conversation with Randall County Sheriff's Deputy Tom Shipman about whether he could shoot the vehicle to disable it. When Shipman mentioned to Mullenix that there was another officer beneath the overpass, Mullenix replied that he did not think he would hit that officer.

As the two vehicles approached, Mullenix fired six rounds at Leija's car. There were no streetlights or ambient lighting. It was dark. Mullenix admitted he could not discern the number of people in Leija's vehicle, whether there were passengers, or what anyone in the car was doing. Mullenix testified that at the time of the shooting, he was not sure who was below the overpass, whether Ducheneaux had actually set up spikes there, or where Ducheneaux was positioned beneath the overpass. After Mullenix fired, Leija's car continued north, engaged the spike strip, hit the median and rolled two and a half times. In the aftermath of the shooting, Mullenix remarked to his supervisor, Sergeant Byrd, "How's that for proactive?" Mullenix had been in a counseling session earlier that same day, during which Byrd intimated that Mullenix was not being proactive enough as a Trooper.

Leija was pronounced dead soon after the shooting. The cause of death was later determined to be one of the shots fired by Mullenix that had struck Leija in the neck. The evidence indicates that at least four of Mullenix's six shots struck Leija's upper body, and no

evidence indicates that Mullenix hit the vehicle's radiator, hood or engine block.

The incident was investigated by Texas Ranger Jay Foster. Foster concluded that Mullenix complied with DPS policy and Texas law. The DPS Firearms Discharge Review board reviewed the shooting and concluded that Mullenix complied with DPS policy and Texas law. A grand jury declined to return an indictment of Mullenix. A DPS Office of the Inspector General ("OIG") Report concluded the opposite, that Mullenix was not justified and acted recklessly. The parties disputed the relevance and admissibility of that OIG report, which was subsequently called into question by its author, who testified that he did not have full information on the incident or investigation when he wrote the report. The district court mentioned the report in its statement of facts, but did not further discuss the report.

Beatrice Luna, as the representative of Leija's estate, and Christina Flores, on behalf of Leija's minor child, sued DPS, the Director of DPS Steve McCraw, Trooper Rodriguez, and Trooper Mullenix, in state court, asserting claims under the Texas Tort Claims Act and 42 U.S.C. § 1983. Defendants removed to federal court. Director McCraw's Motion to Dismiss was granted, and plaintiffs' stipulation of dismissal against DPS and Trooper Rodriguez was granted with prejudice. The sole remaining claim is the § 1983 claim against Mullenix, alleging that he subjected Leija to an unconstitutional use of excessive force in violation of the Fourth Amendment. Mullenix answered and asserted the defense of qualified immunity. After discovery, Mullenix moved for summary

judgment on the issue of qualified immunity. On August 7, 2013, the district court issued a memorandum opinion and order denying Mullenix's motion for summary judgment. Mullenix appeals.

II. Discussion

The doctrine of qualified immunity shields "government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In reviewing a motion for summary judgment based on qualified immunity, we undertake a two-step analysis. First, we ask whether the facts, taken in the light most favorable to the plaintiff, show the officer's conduct violated a federal constitutional or statutory right. *See Tolan v. Cotton*, —— U.S. ——, 134 S.Ct. 1861, 1865, 188 L.Ed.2d 895 (2014); *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir.2004) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Second, we ask "whether the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Flores*, 381 F.3d at 395 (internal quotation marks omitted) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)); *see Tolan*, 134 S.Ct. at 1866. We may examine these two factors in any order. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (overruling in part *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Claims of qualified immunity must be evaluated in

the light of what the officer knew at the time he acted, not on facts discovered subsequently. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 411 (5th Cir.2009). As the Supreme Court has recently reaffirmed, "in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan*, 134 S.Ct. at 1863 (internal quotation marks and alteration omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Our jurisdiction to review a denial of a motion for summary judgment based on qualified immunity is limited to legal questions. *See, e.g., Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir.2004) (en banc). Because of this jurisdictional limitation, "we consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Id.* at 348; *see Flores*, 381 F.3d at 394. We review the objective reasonableness of the defendant government official's actions and the scope of clearly established law de novo. *See Flores*, 381 F.3d at 394. We "may review the district court's conclusion that issues of fact are material, but not the conclusion that those issues of fact are genuine." *Id.*

A. Constitutional Violation

Under the first prong of the qualified immunity analysis, the plaintiffs must produce facts sufficient to show that Mullenix's actions violated Leija's Fourth Amendment rights. *Tolan*, 134 S.Ct. at 1865; *Flores*,

381 F.3d at 395. "[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). To show a violation, the plaintiffs must produce facts sufficient to show that Leija suffered (1) an injury; (2) which resulted directly from a use of force that was clearly excessive to the need; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir.2000). "This is an objective standard: 'the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' " *Ramirez v. Knoulton*, 542 F.3d 124, 128–29 (5th Cir.2008) (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. 1865).

"There are few, if any, bright lines for judging a police officer's use of force; when determining whether an officer's conduct violated the Fourth Amendment, we must slosh our way through the factbound morass of reasonableness." *Lytle*, 560 F.3d at 411 (internal quotation marks and alteration omitted) (quoting *Scott v. Harris*, 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)). "To gauge the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for force," paying "careful attention to the facts and circumstances of each particular case." *Flores*, 381 F.3d at 399. "The intrusiveness of a seizure by means of deadly force is unmatched." *Garner*, 471 U.S. at 9, 105 S.Ct. 1694; *see Flores*, 381 F.3d at 399. Bal-

anced against this intrusion are "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Lytle*, 560 F.3d at 411.

When deadly force is used, it is clear that the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis. *See Plumhoff v. Rickard*, — U.S. —, 134 S.Ct. 2012, 2021, 188 L.Ed.2d 1056 (2014) (concluding that deadly force was objectively reasonable where "it is beyond serious dispute that Rickard's flight posed a grave public safety risk"); *Scott*, 550 U.S. at 386, 127 S.Ct. 1769 (noting that the use of deadly force was objectively reasonable when "[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others"); *see also Garner*, 471 U.S. at 11, 105 S.Ct. 1694 ("Where the suspect poses no immediate threat to the officer the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); *Thompson v. Mercer*, 762 F.3d 433, 440, 2014 WL 3882460, at *5 (5th Cir. Aug. 7, 2014) (noting that "the question is whether the officer had reason to believe, at that moment, that there was a threat of physical harm"); *Hathaway v. Bazany*, 507 F.3d 312, 320 (5th Cir.2007) (noting that the "reasonableness of an officer's use of deadly force is determined by the existence of a credible, serious threat to the physical safety of the officer or to those in the vicinity"); *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir.2001) ("The excessive force inquiry is confined to

whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting Bazan."); *Vaughan v. Cox*, 343 F.3d 1323, 1330 (11th Cir.2003) ("Genuine issues of material fact remain as to whether [the suspects'] flight presented an immediate threat of serious harm to [the police officer] or others at the time [the officer] fired the shot.").

With regard to high-speed chases, the Supreme Court has held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott*, 550 U.S. at 386, 127 S.Ct. 1769; *see also Plumhoff*, 134 S.Ct. at 2021–22 (applying *Scott* to a case involving the shooting of a suspect in a high-speed chase). Likewise, this court has recently held that a sheriff who used an assault rifle to intentionally shoot a fleeing suspect as he approached in a truck, after a lengthy, dangerous chase, did not violate the Fourth Amendment. *Thompson*, 762 F.3d at 438–40, 2014 WL 3882460, at *4–5. These cases, however, do not establish a bright-line rule; "a suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is *per se* reasonable." *Lytle*, 560 F.3d at 416. Instead, *Scott*, *Plumhoff* and *Thompson* are simply applications of the Fourth Amendment's reasonableness requirement to particular facts. *See Plumhoff*, 134 S.Ct. at 2020–22; *Scott*, 550 U.S. at 382–83, 127 S.Ct. 1769; *Thompson*, 762 F.3d at 438–40, 2014 WL 3882460, at *4–5. "Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-

too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable." *Lytle*, 560 F.3d at 415; *see Thompson*, 762 F.3d at 438, 2014 WL 3882460, at *4.

Mullenix asserts that his use of force was objectively reasonable as a matter of law because he acted to protect other officers, including Officer Ducheneaux beneath the overpass and officers located further north up the road, as well as any motorists who might have been located further north. However, the district court found that, "As to the existence of an immediate risk of serious injury or death to other officers or to innocent bystanders, the summary judgment evidence in this case presents genuine issues of material fact as to whether that risk did, or did not, exist." We agree. The immediacy of the risk posed by Leija is a disputed fact that a reasonable jury could find either in the plaintiffs' favor or in the officer's favor, precluding us from concluding that Mullenix acted objectively reasonably as a matter of law. *See Scott*, 550 U.S. at 380, 127 S.Ct. 1769 (explaining that whether the driver "was driving in such fashion as to endanger human life" was a "factual issue"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (explaining that the "inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying [the appropriate] evidentiary standard could reasonably find for either the plaintiff or the defendant").

On this record, the risk posed by Leija's flight is disputed and debatable, and a reasonable jury could conclude that Leija was not posing a "substantial and

immediate risk" at the time of the shooting. *Scott*, 550 U.S. at 386, 127 S.Ct. 1769. Many of the facts surrounding Leija's flight from police, viewed in the light most favorable to the plaintiffs, negate the risk factors central to the reasonableness findings in cases like *Scott*, *Plumhoff* and *Thompson*. According to the plaintiffs' version of the facts, although Leija was clearly speeding excessively at some times during the pursuit, traffic in the rural area was light. There were no pedestrians, no businesses and no residences along the highway, and Leija ran no other cars off the road and engaged no police vehicles. Further, there is evidence showing that Leija had slowed to about 80 miles per hour prior to the shooting. Spike systems which could have ended the pursuit with non-lethal means had already been prepared in three locations ahead of the pursuit. In *Scott* and *Plumhoff*, on the other hand, multiple other methods of stopping the suspect through non-lethal means had failed, the suspects were traveling on busy roads, had forced multiple other drivers off the road, had caused collisions with officers or innocent bystanders, and at the time of the shooting were indisputably posing an immediate threat to bystanders or other officers in the vicinity. *See Plumhoff*, 134 S.Ct. at 2017–18, 2021–22; *Scott*, 550 U.S. at 379–80, 383–84, 127 S.Ct. 1769. Likewise, in *Thompson*, this court found that the officers had tried "four times" to stop the chase with non-lethal methods, before resorting to deadly force to stop a driver who posed "extreme danger to human life." *Thompson*, 762 F.3d at 438, 440, 2014 WL 3882460, at *4, *6. The *Thompson* court explained that

> even the Thompsons concede that their son represented a grave risk when he "reached speeds exceeding 100 miles per hour on the interstate, when he ran numerous stop signs, when he had 'recklessly' driven on the wrong side of the road, [and] when he avoided some road spikes [and] took officers down Blue Flat Road where a horse was loose." Indeed, parts of the police camera footage might be mistaken for a video game reel, with Keith disregarding every traffic law, passing other motorists on the left, on the right, on the shoulder, and on the median. He occasionally drove off the road altogether and used other abrupt maneuvers to try to lose his pursuers. The truck was airborne at least twice, with Keith struggling to regain control of the vehicle. In short, Keith showed a shocking disregard for the welfare of passersby and of the pursuing law enforcement officers.

Id. at 438, 2014 WL 3882460, at *4.

To the extent that we must view facts in accordance with the video, *see Scott,* 550 U.S. at 378–80, 127 S.Ct. 1769; *Thompson,* 762 F.3d at 438–39, 2014 WL 3882460, at *4, the video supports the plaintiffs' version of the facts. In *Scott,* the plaintiff argued that the force used was unreasonable because the driver posed "little, if any actual threat to pedestrians or other motorists." *Id.* at 378, 127 S.Ct. 1769. However, the Court said,

> [t]he videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than

> a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379–80, 127 S.Ct. 1769. The Court relied on the video to resolve disputed facts, holding that the video "blatantly contradicted" the plaintiff's version of the facts, "so that no reasonable jury could believe it." *Id.* at 380, 127 S.Ct. 1769. Likewise, in *Thompson*, the plaintiffs argued that the threat posed by the chase had ended because the rural road was empty by the time of the shooting, but this court found that "the Thompsons' characterization of the scene is belied by the video evidence," which showed multiple cars pulling over to avoid the chase, and dangerous conditions on the road, which had limited visibility and no shoulder for cars to pull onto. *Thompson*, 762 F.3d at 438–39, 2014 WL 3882460, at *4. Here, however, the video supports the plaintiffs' assertions that during the pursuit, traffic on the divided highway was light, there were no pedestrians, businesses or residences along the highway, and Leija ran no other cars off the road and did not engage any police vehicles, such that a reasonable jury could find that Leija's driving did not

pose an immediate danger to other officers or drivers.

Further, in concluding that the use of force was reasonable, the *Thompson* opinion relies repeatedly on the fact that the officers had made four attempts to disable the vehicle with non-lethal methods before resorting to deadly force. *Thompson*, 762 F.3d at 438–39, 439–40, 2014 WL 3882460, at *4, *6. With regard to the existence of a Fourth Amendment violation, the holding of *Thompson* is that "after multiple other attempts to disable the vehicle failed, it was not unreasonable for Mercer to turn to deadly force to terminate the dangerous high-speed chase." *Id.* at 438, 2014 WL 3882460, at *4. The opinion later similarly concludes that "law enforcement reasonably attempted alternate means of seizure before resorting to deadly force," *id.* at 440, 2014 WL 3882460, at *6, and discusses this fact twice in its discussion of whether the law was sufficiently clearly established, *id.* In the instant case, there were spikes already in place under the bridge, and officers prepared to deploy spikes in two additional locations up the road. Yet Mullenix fired his rifle at Leija's vehicle before Leija had encountered any of the spikes. In contrast to *Thompson*, the non-lethal methods that were already prepared were never given a chance to work.

We certainly do not discount Leija's threats to shoot officers, which he made to the Tulia dispatcher and which were relayed to Mullenix and other officers. However, this fact is not sufficient, as a matter of law, to establish that Leija posed an immediate risk of harm at the time of the shooting. Under the plaintiffs' version of the facts and viewing all inferences in the light most favorable to the plaintiffs, a reasonable jury

could still conclude that there was not a sufficiently immediate threat to justify deadly force. In a case involving the shooting of a suspect, we have stated that the "core issue" is "whether the officer reasonably perceived an immediate threat." *Reyes v. Bridgwater*, 362 Fed.Appx. 403, 408 (5th Cir.2010). "[T]he focus of the inquiry is the act that led the officer to discharge his weapon." *Id.* at 406 (internal quotation marks and alteration omitted) (quoting *Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir.2009)); *see also Bazan*, 246 F.3d at 493 ("The excessive force inquiry is confined to whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting."). The factual scenario here is substantially different, in terms of the imminence and immediacy of the risk of harm, from situations where we have granted qualified immunity to officers who shot an armed suspect, or a suspect believed to be armed. *See Ramirez*, 542 F.3d at 127, 129 (suspect stopped by the side of the road after a brief chase displayed a gun, repeatedly ignored police commands, was located yards from police officers, and brought his hands together in a manner that indicated he may have been reaching for the gun, prompting officer to shoot him); *Ballard v. Burton*, 444 F.3d 391, 402–03 (5th Cir.2006) (mentally disturbed suspect "refused to put down his rifle, discharged the rifle into the air several times while near officers, and pointed it in the general direction of law enforcement officers"); *Reese v. Anderson*, 926 F.2d 494, 500–01 (5th Cir.1991) (suspect stopped after a high-speed chase refused to exit the car, refused to follow police commands, repeatedly raised and lowered his hands, turned away from the officer and reached

lower toward the floorboard, prompting the officer to shoot him); *compare Reyes*, 362 Fed.Appx. at 407 (fact issue precluded qualified immunity where suspect was armed with a knife, but made no threatening gesture or motion), *with Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir.2014) (qualified immunity granted to officer where video confirmed that suspect "was standing up out of bed and had raised the knife above his head at the time the shots were fired"). We discuss these cases not because we hold that an officer must actually see a weapon before taking action to protect himself or others from the suspect, but because they illustrate that, even when a weapon is present, the threat must be sufficiently imminent at the moment of the shooting to justify deadly force.

In *Thompson*, the court did note the existence of a stolen gun in the car of the fleeing suspect as a fact that supported its conclusion that the suspect posed an "ongoing threat of serious harm," even though the officer had no way of ascertaining whether the suspect intended to use the weapon. *Thompson*, 762 F.3d at 439, 2014 WL 3882460, at *5 (quotation omitted). However, in *Thompson*, the officer also knew at the time of the shooting that the suspect was fleeing in a stolen car with a stolen weapon, had abducted a woman during his flight, and that the "unidentified suspect was admittedly suicidal and had already acted with utter desperation in attempting to evade law enforcement." *Id.* at 439, 440–41, 2014 WL 3882460, at *5, 6. Thus, the court found that the officer was "justified in assuming" that the presence of the stolen weapon contributed to the continuing threat posed by suspect. *Id.* at 439, 2014 WL 3882460,

at *5.

Here, although Leija had stated to the dispatcher that he was armed and would shoot officers, he was not fleeing the scene of a violent crime, no weapon was ever seen, and at the time of the shooting, most officers and bystanders were miles away, where they would not have been encountered until after the spikes were given a chance to stop the chase. On appeal, Mullenix relies heavily on the presence of Ducheneaux beneath the overpass, and the risk that Leija could shoot Ducheneaux as he sped by. However, he also testified that he did not actually know Ducheneaux's position or what he was doing beneath the overpass.[1] Mullenix argues that he knew that an officer had to be positioned near a roadway to deploy spikes, but the facts, taken in the light most favorable to the plaintiffs, also show that officers were trained to deploy spikes in a location where they were able to take a protective position, that there were several pillars at the Cemetery Road overpass and that Ducheneaux had positioned himself behind a pillar as he was trained to do. Further, just prior to the shooting, Sheriff's Deputy Shipman mentioned Ducheneaux's presence beneath the overpass, and Mullenix replied only that he did not think *he* would hit Mullenix; he

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[1] We do not hold that an officer must necessarily have another officer that he believes to be in danger in his sightline at the time he takes action. We merely state that, given his position atop a bridge in the dark of night, and given all the circumstances of this particular case, a reasonable jury could conclude that Mullenix lacked sufficient knowledge to determine whether or not Ducheneaux was in immediate danger from Leija, or whether Mullenix's own actions were decreasing the risk to Ducheneaux.

did not indicate that he perceived a threat to Ducheneaux from Leija. In this situation, a jury could conclude Mullenix did not reasonably perceive an immediate threat at the time of the shooting, sufficient to justify the use of deadly force.

The plaintiffs also point to evidence showing that Mullenix heard the warning that Leija had said he had a gun six minutes before the shooting, and went to the bridge and waited three minutes for Leija's car to approach. During this period Mullenix had time to consider his approach, including time to ask for his supervisor's opinion, inform Rodriguez of his intentions, and discuss the feasibility of shooting the car with Shipman. Plaintiffs argue that this is not the type of "split-second judgment" that officers must make when faced with an imminent risk of harm to themselves or others. *See Plumhoff*, 134 S.Ct. at 2020; *Graham*, 490 U.S. at 396–97, 109 S.Ct. 1865; *Hathaway*, 507 F.3d at 320–21. Although Mullenix relies heavily on the assertion that it is up to the "officer on the scene" to make judgments about the use of deadly force, Mullenix was not the only, or even the primary, officer on the scene. Officer Rodriguez was immediately in pursuit of Leija, and multiple other officers from various law enforcement agencies were on the scene at Cemetery Road and were at multiple locations further north along I–27, planning to deploy tire spikes to stop the suspect. There is no evidence that any other officer from any of the law enforcement agencies involved in the pursuit, hearing the same information that Mullenix heard, including the information regarding Leija's threats, decided that deadly force was necessary or warranted. Further, via the

dispatcher, Mullenix asked his supervisor, Sergeant Byrd, about his plan to shoot at the car. It is undisputed that Sergeant Byrd advised Mullenix to "stand by" and "see if the spikes work first." While there is a dispute of fact about whether Mullenix heard the instruction to "stand by," Byrd's response certainly bears on the question of whether Mullenix acted unreasonably. Lastly, Mullenix testified that he intended to shoot the engine block of the car in an attempt to disable it, although there is no evidence that shooting at the engine is a feasible method of immediately disabling a car. His justification for the use of force was to disable the car, but non-lethal methods were already in place to achieve the same goal, undermining the asserted necessity for deadly force at that particular instant.

We conclude that whether Leija was posing a substantial and immediate risk of danger to other officers or bystanders, sufficient to justify the use of deadly force at the time of the shooting, is a disputed fact, and we must draw all inferences in favor of the plaintiff. Based on the evidence in the record, a jury could find that a reasonable officer would have concluded that the risk Leija posed was not sufficiently immediate so as to justify deadly force, and that the non-lethal methods already in place could stop the chase without the need for deadly force. We thus cannot conclude that Mullenix's actions were objectively reasonable as a matter of law. *See Vaughan*, 343 F.3d at 1330 (denying a motion for summary judgment on the grounds of qualified immunity when "[g]enuine issues of material fact remain[ed] as to whether [the suspects'] flight presented an immediate threat of serious harm to [the

police officer] or others at the time [the officer] fired the shot").[2]

B. Clearly Established Law

Under the second prong of the qualified immunity analysis, plaintiffs must show that Mullenix's actions violated a constitutional right that was sufficiently clearly established. *Flores*, 381 F.3d at 395. For a right to be clearly established, "[t]he contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). "The central concept [of the test] is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Kinney*, 367 F.3d at 350 (quoting *Hope*, 536 U.S. at 740, 122 S.Ct. 2508). Further, while the Supreme Court has stated that "courts

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[2] We of course agree with the dissent that once the relevant facts are determined and all factual inferences are drawn in favor of the non-moving party to the extent supportable by the record, the question of whether the officer acted objectively unreasonably is one of law. *See Scott*, 550 U.S. at 381 n. 8, 127 S.Ct. 1769. Here, however, there are underlying questions of fact, including the immediacy of the risk and whether Mullenix heard his supervisor's direction to "stand by" and "see if the spikes work first."

should define the 'clearly established' right at issue on the basis of the 'specific context of the case,' " it has also recently reminded us that we "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan*, 134 S.Ct. at 1866 (quoting *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151).

While Mullenix devotes the bulk of his argument to this prong of the qualified immunity analysis, "We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle*, 560 F.3d at 417. "This holds as both a general matter and in the more specific context of shooting a suspect fleeing in a motor vehicle." *Id.* at 417–18 (internal citations omitted) (citing *Kirby v. Duva*, 530 F.3d 475, 484 (6th Cir.2008); *Vaughan*, 343 F.3d at 1332–33); *see also Sanchez v. Fraley*, 376 Fed.Appx. 449, 452–53 (5th Cir.2010) (holding that "it was clearly established well before [April 23, 2007] that deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," and "the threat of serious harm must be immediate"); *Reyes*, 362 Fed.Appx. at 406 ("Unlike some areas of constitutional law, the question of when deadly force is appropriate—and the concomitant conclusion that deadly force is or is not excessive—is well-established.").

Mullenix points to the Supreme Court's recent decision in *Plumhoff* to argue that the law was not

clearly established. The *Plumhoff* Court relied primarily on *Brosseau*, which held that as of 1999 it was not clearly established that it was objectively unreasonable force "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Brosseau*, 543 U.S. at 195–97, 200, 125 S.Ct. 596. However, *Plumhoff* holds only that where a fleeing suspect "indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby," a police officer's use of deadly force is not clearly established as unreasonable. *Plumhoff*, 134 S.Ct. at 2021–22, 2023; *see Brosseau*, 543 U.S. at 200, 125 S.Ct. 596. It does not, however, undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders. *See Lytle*, 560 F.3d at 417–18. *Thompson* is no different. Similar to *Plumhoff*, it holds that the officer's use of force to stop a high-speed chase was not clearly established as unreasonable where the fleeing suspect had stolen a car and kidnapped a woman, had evaded four attempts to stop the car with non-lethal force, and whose driving continued to pose a "tremendous risk" to the public and other officers. *Thompson*, 762 F.3d at 440, 2014 WL 3882460, at *6.

At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a substantial and immediate threat, violated the Fourth Amendment. Because on this record, the immediacy of the risk posed by Leija cannot be resolved as a matter of law at the summary judgment stage, we affirm

the district court's denial of qualified immunity.[3]

III. Conclusion

For the foregoing reasons, we AFFIRM the denial of summary judgment.

KING, Circuit Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the district court's denial of qualified immunity to Chadrin Mullenix. The majority's decision conflicts, in several respects, with Supreme Court precedent and our court's recent decision in *Thompson v. Mercer*, No. 13–10773, 2014 WL 3882460, 762 F.3d 433 (5th Cir.2014). While it is a jury's responsibility to resolve material fact disputes, because no such fact dispute is present here, it is our responsibility as judges to decide whether Mullenix acted objectively unreasonably under the Fourth Amendment. Based on my review of the record, I conclude that Mullenix's use of force was not objectively unreasonable because the threat Israel Leija, Jr. posed to nearby officers, viewed in light of his culpability for that threat, was sufficiently grave to justify the use of a gun to shoot at Leija's vehicle.

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[3] Mullenix makes a separate argument that the district court relied on inadmissible summary judgment evidence, specifically the OIG report concluding that Mullenix's actions were not justified. This report was later called into question by its author, who testified that it was not based on a full review of the incident. However, there is no indication in the district court's order that it relied on the OIG report in denying summary judgment, and we likewise do not rely on it. If there are questions as to its admissibility, the district court can resolve those in due course as the litigation proceeds.

The majority opinion is replete with the uncontradicted facts. It nevertheless purports to identify a single factual dispute precluding summary judgment, explaining: "whether Leija was posing a substantial and immediate risk of danger to other officers or bystanders, sufficient to justify the use of deadly force at the time of the shooting, is a disputed fact, and we must draw all inferences in favor of the plaintiff." But the "fact issue" referenced by the majority—and referred to a jury—is simply a restatement of the objective reasonableness test that applies to Fourth Amendment excessive force claims. As the Supreme Court and our circuit have held, the application of that test is a legal question to be decided by a judge.

In *Scott v. Harris*, decided in 2007, the Supreme Court explained, "[a]t the summary judgment stage once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of [an officer]'s actions . is a pure question of law." 550 U.S. 372, 381 n. 8, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (internal citations and emphasis omitted). In clarifying this point, the Court was responding to Justice Stevens's argument, in dissent, that "[w]hether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury." *Id.* at 395, 127 S.Ct. 1769 (Stevens, J., dissenting).

This approach accords with our circuit's longstanding view that, under the Fourth Amendment, the determination of the reasonableness of a seizure is a conclusion of law. *See, e.g., Jimenez v. Wood Cnty.*, 621 F.3d 372, 376 (5th Cir.2010), *aff'd en banc*, 660 F.3d

841 (5th Cir.2011); *see also White v. Balderama*, 153 F.3d 237, 241 (5th Cir.1998) ("While it is true that the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application and that proper application of the Fourth Amendment objective reasonableness test requires careful attention to the facts and circumstances of each case, the ultimate determination of Fourth Amendment objective reasonableness is a question of law." (internal quotation marks, citations, and brackets omitted)). More recently, in *Thompson*, we cited *Scott* and rejected the plaintiffs' contention in that case that the question of reasonableness must be submitted to a jury. 762 F.3d at 441, 2014 WL 3882460, at *7 (citing *Scott*, 550 U.S. at 381 n. 8, 127 S.Ct. 1769).

In spite of *Scott* and our circuit's precedent, the majority—without actually identifying any disputed facts—repeatedly suggests that fact disputes remain. The majority's conclusion that summary judgment is inappropriate appears to be based on its belief that jurors could draw different "inferences," albeit based on the *undisputed* summary judgment evidence, about the reasonableness of Mullenix's actions. But the majority confuses factual inferences, which are for a jury to make, with legal conclusions, which are committed to a judge. *See Crowell v. Shell Oil Co.*, 541 F.3d 295, 309 (5th Cir.2008) ("A court is not required to draw legal inferences in the non-movant's favor on summary judgment review."). The majority points to a number of undisputed facts, such as the absence of heavy traffic near Leija, that might weigh against a conclusion that the risk Leija posed justified the level

of force used by Mullenix. That the question whether Mullenix's actions in this case were objectively reasonable is, in the majority's wording, "debatable," however, does not transform what otherwise would be a legal question into a factual question precluding summary judgment. *Cf. Gould v. Davis*, 165 F.3d 265, 269 (4th Cir.1998) ("While the district court is correct that different facts in evidence could be used to support different conclusions as to whether the officers deserve qualified immunity, this does not indicate a *factual* dispute, but rather, a question of law. The district court's order does not point to disputed questions of fact, but rather, disputed legal inferences that could be drawn from what is an undisputed factual record.").

The majority further cites to several decisions in support of its argument that this case should be sent to a jury. In these decisions, however, the courts identified concrete factual disputes precluding summary judgment. *See Tolan v. Cotton*, —— U.S. ——, ——, 134 S.Ct. 1861, 1868, 188 L.Ed.2d 895 (2014) (holding that there were fact disputes "with regard to the lighting, [the plaintiff's] mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting"); *Vaughan v. Cox*, 343 F.3d 1323, 1330 (11th Cir.2003) (holding that there were factual disputes as to whether the suspect intentionally rammed a police vehicle and whether the suspect made aggressive moves immediately before the officer fired); *see also Scott*, 550 U.S. at 380, 127 S.Ct. 1769 (explaining that whether the driver "was driving in such fashion as to endanger human life" was a "fac-

tual *issue*," but that there was no genuine factual *dispute* in that case (emphasis added)); *Lytle v. Bexar Cnty.*, 560 F.3d 404, 412–13 (5th Cir.2009) (concluding that the direction and distance that the suspect's car was traveling at the moment the officer fired were disputed). No such disputed facts are present here. Accordingly, regardless of whether Mullenix's use of force was reasonable, as I believe, or excessive, this case is ripe to be decided in this appeal.

Given this, I turn next to the primary question presented here: whether, resolving any genuine fact issues[1] and drawing all factual inferences in the plaintiffs' favor, Mullenix's use of force against Leija was objectively unreasonable, as a matter of law, under the Fourth Amendment. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, — U.S. ——, —

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[1] As I see it, the sole disputed fact in this case is whether Mullenix heard the message relayed from his superior, Sergeant Byrd, that he should "stand by" and "see if the spikes work first." But this fact issue, though genuine, is not material. The uncontradicted testimony of Byrd and other officers was that, under department policy, it was the responsibility of the "officer on the scene" to make judgments about the use of force. Furthermore, Sergeant Byrd's opinion as to whether Mullenix should delay shooting at Leija's vehicle, at best, informs but does not decide whether Mullenix's use of force was objectively unreasonable in light of the risks posed by and to Leija. *See Scott*, 550 U.S. at 375 n. 1, 127 S.Ct. 1769 (observing that "[i]t is irrelevant to our analysis whether [the officer] had permission to take the precise actions he took" when he bumped the fleeing suspect off the road).

–, 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011) (internal quotation marks and citation omitted). The Supreme Court has explained that, in applying Fourth Amendment standards, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Whether the force used was reasonable is determined "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396, 109 S.Ct. 1865. In "weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing" a suspect, a court must "take into account not only the number of lives at risk, but also their relative culpability." *Scott*, 550 U.S. at 384, 127 S.Ct. 1769.

Applying these legal standards, and considering the facts as a whole, Mullenix's decision to fire at Leija's vehicle was not objectively unreasonable under the Fourth Amendment. As this court recognized in *Thompson*, a fleeing suspect's possession of a firearm presents an independent and grave risk to officers and civilians that may, under certain circumstances, justify firing at the suspect's vehicle, even when doing so poses a significant risk to the suspect's life. The plaintiffs in *Thompson* argued that the officer's actions were unreasonable because, at the time that the officer fired, the suspect "was driving on a 'lonely' rural road and his vehicle had already been disabled" by the

shots that struck its radiator. 762 F.3d at 439, 2014 WL 3882460, at *4. According to the plaintiffs, this showed that the "threat to the officers had already passed." *Id.* at 439, 2014 WL 3882460, at *5. We rejected this argument in no uncertain terms, noting that it "presumes that [the suspect] was only a threat to the extent that the truck was operational," when, in fact, it was "undisputed that [the suspect] was in possession of a stolen firearm and that [the officer] was aware of that fact." *Id.* While we "assume[d] for the purposes of summary judgment that [the suspect] did not" actually intend to use the gun, we concluded that "[the officer] was justified in assuming that there was an ongoing 'threat of serious harm to the officer or others,' even if [the suspect]'s vehicle was already disabled." *Id.* (quoting *Carnaby v. City of Houston*, 636 F.3d 183, 188 (5th Cir.2011)).

Our analysis in *Thompson* compels a similar holding in this case. If anything, the objective threat that Leija would fire at officers or the public was more serious than the threat posed by the suspect in *Thompson*. In *Thompson*, although there was a firearm in the suspect's vehicle, he never threatened to use it. *Id.* at 439, 2014 WL 3882460, at *5. Here, however, Leija twice called the Tulia Police Dispatch on his cell phone, during the pursuit, stating that he had a gun and that he would use it to shoot any law enforcement officers he saw. This information was conveyed to the officers involved in the pursuit, including Mullenix. Mullenix was also aware that there were several officers setting up tire spikes at various locations along the interstate, and that there was a police vehicle, with its lights on, parked underneath the bridge from which

he was planning to fire. Moreover, Leija was highly culpable for the risks he posed, a factor that *Scott* instructs us to consider. 550 U.S. at 384, 127 S.Ct. 1769. Thus, even if the risk of serious injury Mullenix posed to Leija by shooting at his vehicle exceeded the risk of serious injury Leija posed to the officers in this case, Mullenix's actions would not have been unreasonable under the Fourth Amendment.

The majority attempts to distinguish *Thompson*, in part, by pointing to the threat, in that case, posed by the suspect's vehicle during the chase. But that argument is a non sequitur. In concluding, in *Thompson*, that the risk posed by the suspect's possession of a firearm justified the officer's decision to fire at it, we assumed that the vehicle was no longer operational. *Id.* at 439, 2014 WL 3882460, at *5. The majority also points out that the suspect in *Thompson* was suicidal, had stolen a car, and had abducted a woman during the flight (who was released before he was shot). While these facts were, no doubt, relevant to our analysis of the risks in *Thompson*, it would be strange to conclude that the objective risk that Leija would use a gun was not equally great, given that Leija alone specifically indicated his intent to shoot at officers.

The majority further minimizes the risk that Leija posed to Ducheneaux and the other officers positioned along the road by citing several decisions in which a suspect was on foot or in a stopped vehicle.[2] *See, e.g.*,

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[2] The majority also states that Mullenix "did not indicate that he perceived a threat to Ducheneaux from Leija" before firing at Leija's vehicle. Mullenix's subjective perception of a threat, how-

Ballard v. Burton, 444 F.3d 391, 402–03 (5th Cir.2006). In those cases, it was possible for the officers to observe the suspect's weapon, hands, or both, permitting the officers to react quickly before the suspect could use a weapon. *Id.* Here, however, Leija was traveling at high speeds and under cover of night, and Mullenix and the other officers could not see into Leija's vehicle. The officers would not have been able to wait to shoot until after Leija raised his gun (which would not have been visible), without jeopardizing their own lives. *See Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir.2008) ("A reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is often ... too late to take safety precautions." (internal quotation marks and citation omitted)). Equally troubling is the majority's suggestion that, despite Leija's two statements to police dispatchers that he possessed a gun, a reasonable officer could not have concluded that he had a firearm because Leija was "not fleeing the scene of a violent crime" and "no weapon was ever seen." The ma-

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ever, is not material to the objective reasonableness inquiry before us. *See Ashcroft*, 131 S.Ct. at 2080. Moreover, the majority is plainly incorrect on this point. The record reflects that Mullenix's actions were motivated by his belief that Leija would fire his weapon. Mullenix informed another officer over police radio that he was considering firing at Leija's vehicle because "this guy has a weapon and is willing to shoot." The majority asserts that "there is no evidence that any other officer from any of the law enforcement agencies involved in the pursuit ... decided to respond with deadly force." The record shows, however, that Mullenix discussed his plan to shoot at Leija's vehicle with two other officers involved in the pursuit—Rodriguez and Shipman—neither of whom made any effort to dissuade him.

jority's suggestion eviscerates the Supreme Court's requirement that we adopt the perspective of a reasonable officer on the scene and refrain from viewing the facts with "the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865.

Additionally, while officers should use "non-lethal alternatives" to deadly force, when available, Mullenix reasonably believed that deploying tire spikes along the highway posed a significant risk of harm to officers, including Ducheneaux. Although the officers were trained to protect themselves, to the extent possible, when deploying and operating spikes, such protection was necessarily limited by the officers' need to position themselves near the roadway and to maintain visual contact with oncoming traffic, so that they could use a rope attached to the spikes to pull them in front of the approaching suspect vehicle and then out of the way of approaching police (here, Rodriguez) and other vehicles. There is no evidence suggesting that the officers deploying road spikes could position themselves in a manner that would eliminate their exposure to gunfire from passing vehicles.

The majority notes that, in *Thompson*, the officers tried several alternative methods to stop the chase before the officer shot and killed the suspect. 762 F.3d at 438–39, 440–41, 2014 WL 3882460, at *4, *6. Yet one of these "non-lethal methods," as the majority refers to them, involved an officer firing a shotgun at the suspect's truck tires while that vehicle was in motion. *Id.* at 440–41, 2014 WL 3882460, at *6. It is hard to see how firing at a moving vehicle's tires is any less lethal than shooting at its engine block, given that both pose

a substantial risk that the driver will be unintentionally struck by a bullet. Moreover, the fact that tire spikes twice failed to stop the suspect's truck in *Thompson* only adds to the evidence presented in this case that tire spikes are often ineffective. The Fourth Amendment does not require that an officer have chosen what, in hindsight, appears to be the best course of action—only that the officer's judgments be reasonable in light of the uncertainties inherent in police work. *See Graham*, 490 U.S. at 397, 109 S.Ct. 1865. Here, an objectively reasonable officer could have concluded, under the circumstances, that the risks posed to officers when deploying tire spikes outweighed their potential benefits.

I further question the majority's implication that Mullenix lacked sufficient knowledge to determine whether Ducheneaux was at risk. Mullenix knew that there was an officer below the bridge that he was standing on, that the officer's patrol lights were flashing (alerting Leija to the officer's presence), that the officer was likely operating tire spikes, and that officers operating spikes are often vulnerable to gunfire from passing vehicles. Mullenix also knew that tire spikes are not always effective in stopping vehicles and that there were additional officers located just minutes away along the highway. The risks at stake here were at least as particularized as in the Supreme Court's decisions in *Scott* and *Brosseau* and our decision in *Thompson*, where the officers employing force were not aware of the precise location or identity of the other officers and civilians they were acting to protect. *See Scott*, 550 U.S. at 384, 127 S.Ct. 1769 ("[R]espondent posed an actual and imminent threat

to the lives of any pedestrians who *might have been present.*" (emphasis added)); *Brosseau v. Haugen*, 543 U.S. 194, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (granting qualified immunity to an officer who fired at a driver who had not yet driven his car in a dangerous manner to prevent possible harm to "other officers on foot who [she] believed were in the immediate area ... [and] any other citizens who might be in the area." (internal quotation marks and citation omitted)); *Thompson*, 762 F.3d at 439, 2014 WL 3882460, at *5 (holding that it was sufficient for the officer to reasonably believe there "might be other travelers on the road," even though the officer was not "aware of their presence"); *see also Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 581 (5th Cir.2009) (recognizing that "the holding of *Scott* was not dependent on the actual existence of bystanders—rather, the Court was also concerned about the safety of those who could have been harmed if the chase continued").

The majority also suggests that the harm Leija posed to the officers may have been insufficiently "immediate" to justify Mullenix's use of force. Yet it is difficult to conceive of a threat that is more immediate than the one Leija posed. At the moment Mullenix fired, Leija was seconds away from crossing the path of one of the officers he had threatened to shoot and minutes away from passing several other officers. *Cf. Thompson*, 762 F.3d at 440, 2014 WL 3882460, at *6 (noting that, at the time point the officer fired at the suspect driver, the next town the driver would reach was "approximately a mile away").

Finally, the majority implies that because Mullenix's original intent was to strike the engine block of Leija's vehicle, the lack of evidence that shooting at an engine block is an effective method for disabling a car is somehow relevant. But "Fourth Amendment reasonableness is predominantly an objective inquiry" that "regulates conduct rather than thoughts." *Ashcroft*, 131 S.Ct. at 2080 (internal quotation marks and citation omitted). As the Supreme Court clarified in *Scott*, "in judging whether [an officer]'s actions were reasonable, we must consider the *risk* of bodily harm that [the officer]'s actions posed to [the suspect]." 550 U.S. at 383, 127 S.Ct. 1769 (emphasis added); *see also id.* (explaining that the Fourth Amendment's objective reasonableness test does not depend on whether particular actions fall within the definition of "deadly force"); *Thompson*, 762 F.3d at 438, 2014 WL 3882460, at *4 ("There is no doubt that firing the assault rifle directly into the truck created a significant—even certain—*risk* of critical injury to [the suspect]. Under these circumstances, however, the *risk* was outweighed by 'the extreme danger to human life posed by' reckless vehicular flight." (emphasis added) (citation omitted)). Mullenix's actions would not violate the Fourth Amendment as long as he reasonably believed that the *risks* posed by Leija, viewed in light of Leija's culpability for those *risks*, exceeded the *risk* of harm to Leija from shots fired in the direction of his vehicle. *See Scott*, 550 U.S. at 383–84, 127 S.Ct. 1769.[3]

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[3] It is worth noting that the probability of disabling Leija's car may not be as low as the plaintiffs and the district court presume. In *Thompson*, although the suspect was travelling at high speeds, an officer positioned at the side of the road aimed at and

In my view, Mullenix reasonably weighed these risks.

In conclusion, I recognize that this is a close case. Whether Mullenix is entitled to qualified immunity is debatable. Forced to decide, one or more of my colleagues in the majority might well conclude that Mullenix's actions violated clearly established Fourth Amendment law. While that would not be my conclusion, it would nevertheless be a fair, responsible decision. What we cannot do, on this record, is decline to decide the Fourth Amendment issue and, instead, effectively lateral that decision to a jury. The ultimate issue of objective reasonableness is purely legal, and there are no genuine and material factual disputes preventing us from deciding that issue in this appeal. For that reason, I dissent.

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successfully shot the radiator of the fleeing suspect's vehicle. 762 F.3d at 436, 2014 WL 3882460, at *2.

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No. 14-1143

IN THE

Supreme Court of the United States

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY,

Petitioner,

v.

BEATRICE LUNA, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.; CHRISTINA MARIE FLORES, AS NEXT FRIEND OF J.L. AND J.L., MINOR CHILDREN,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Did the Fifth Circuit correctly conclude that there were triable issues of fact precluding summary judgment as to whether an officer in petitioner's position could reasonably have believed that the driver posed a threat justifying the use of deadly force?

(2) Did the Fifth Circuit correctly hold that triable issues of fact also precluded qualified immunity at this stage?

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STATEMENT OF THE CASE

A. Factual Background

On March 23, 2010, Texas Department of Public Safety Trooper Chadrin Lee Mullenix was called in by his supervisor, Sergeant Robert Byrd, for a performance review. CA5 Record On Appeal ("ROA") 730, 978. Byrd felt that Mullenix was failing to meet expectations and instructed him to be more "proactive" about making traffic stops. Pet. App. 6a; ROA 978-79.

Later that night, a sergeant with the Tulia Police Department saw Israel Leija, Jr. at a Sonic Drive-In and attempted to arrest him on a motion to revoke misdemeanor probation. Pet. App. 2a. The sergeant approached Leija, who was idling in his vehicle with the window open, and informed him that he was under arrest. ROA 558. Leija asked if he could first take his car home. *Id.* The sergeant said no but told him that his father could come pick up the car so that it would not be impounded. *Id.* Leija then "started backing out" around the sergeant's vehicle and drove toward Interstate 27. *Id.* The sergeant followed Leija and advised dispatch of the pursuit. *Id.* 559.

Once on the highway, another officer, Corporal Gabriel Rodriguez, became the primary officer following Leija. Pet. App. 2a; *see* ROA 798. Dispatch relayed that Leija had called and claimed that he would shoot at officers if they did not abandon the chase. Pet. App. 3a.

In response, officers from multiple agencies decided to set up spike systems at three locations on I-27. Pet. App. 3a. Law enforcement agencies across the country routinely use spike systems to disable

vehicles during high-speed chases.[1] A spike system is a long strip of hollow needles that puncture and gradually deflate the tires of any car that drives over them. Chris Rickert, *How Do Police Road Spikes Work?*, Wis. State J. (Mar. 17, 2010, 2:00 PM).[2] To set up spikes, an officer pulls the strip across the roadway and then takes cover. *Id.* From cover, the officer pulls on a cord to raise the spikes into position, and then – once the fleeing motorist has driven over the spikes – pulls again to yank the spikes out of the way of other traffic. *Id.* The officers involved in this case had been trained on spikes and had learned how to take protective positions after deployment. Pet. App. 3a; *see also* ROA 739-40. They decided to set up three sets of spikes along a ten-mile stretch of I-27. *See* ROA 833-34. The first set would be deployed underneath the overpass at Cemetery Road. *See* Pet. App. 3a; *see also* ROA 737.

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[1] *See, e.g.*, N.Y. State Police, *Annual Report* 40 (2007), *available at* http://troopers.ny.gov/introduction/Annual_Reports/AnnualReport2007.pdf; Boston Police Dep't, *Rules and Procedures: Rule 301* § 7.6.10 (2013), *available at* http://bpdnews.com/rules-and-procedures; Seattle Police Dep't, *Manual* § 13.031 (Jan. 1, 2015), *available at* http://www.seattle.gov/police-manual/title-13---vehicle-operations/13031---vehicle-eludingpursuits; Denver Police Dep't, *Operations Manual* 204-9 (Apr. 30, 2015), *available at* http://www.denvergov.org/Portals/720/documents/OperationsManual/204.pdf; Baltimore Cty. Gov't, *Tire Deflation Device Training* (Feb. 26, 2015), http://www.baltimorecountymd.gov/Agencies/police/trainingsection/stopstickstraining.html.

[2] http://host.madison.com/news/local/footnote-how-do-police-road-spikes-work/article_8d768c50-3149-11df-a7b6-001cc4c002e0.html.

Meanwhile, Mullenix, who was working traffic enforcement thirty-two miles away, heard about the pursuit over his radio. ROA 734-35. He decided to join the effort. *Id.* 735.

Instead of deferring to the plan to use spikes, Mullenix radioed that he "might go to the bridge at Cemetery Road with a rifle and see what kind of shot [he] get[s]." ROA 871 (08.Radio.RSCO1). Mullenix said he wanted to shoot at the car's engine. Pet. 6. Yet he had no experience shooting at a moving vehicle or training in stopping a car with gunfire. Pet. App. 4a. His sole experience with shooting moving objects had been firing at clay pigeons with a shotgun. *Id.*

Arriving at the overpass, Mullenix asked over his radio whether attempting to shoot the car with his rifle was "worth doing." Pet. 6. Rodriguez then advised that Leija had slowed to 85 miles per hour. *Id.* Mullenix responded by asking dispatch to contact Sergeant Byrd "on the traffic [they] just heard and ask what he advises." ROA 869 at 9:55 ("Mullenix Dash Cam."). Without waiting for a response, Mullenix left his car. Pet. 6.

Forty seconds after Mullenix asked for Byrd's advice, dispatch conveyed Byrd's order to "stand by" and "wait and see if the spikes work." Mullenix Dash Cam. at 9:55-10:35. As the record stands now, there is a factual dispute about whether Mullenix heard the order. Pet. 6. Mullenix claims that he left the car immediately after asking his supervisor's advice, and that he never turned on his car's loudspeakers to hear the answer. *See id.* 6 n.2. But viewing the evidence in the light most favorable to respondents (as is necessary in the current procedural posture),

Mullenix heard the command – either from the radio in his car through his open trunk or from the radio of nearby officers – and then chose to disregard his sergeant's order. Pet. App. 5a, 28a-29a.

Mullenix waited on the bridge as three minutes passed. Pet. App. 4a. During that time, he observed no other cars on the interstate, and, indeed, understood this rural portion of I-27 to be "very, very lightly traveled." ROA 721. Nor did Mullenix see any pedestrians, businesses, or residences along the highway. Pet. App. 16a; *see also* ROA 719-21.

While waiting, Mullenix also had a "casual conversation" with a sheriff's deputy on the overpass. Pet. App. 5a. Mullenix asked, "What do you think, one shot right down on it?" Mullenix Dash Cam. at 11:06. The deputy replied, "You know we're going to have spikes ready." *Id.* at 11:09. By that time, Sergeant Troy Ducheneaux had set up the spikes below the overpass and had taken cover behind one of the bridge's pillars. ROA 740. Mullenix and the deputy discussed Ducheneaux's presence only in regard to whether Mullenix himself "would hit [Ducheneaux]; he did not indicate that he perceived a threat to Ducheneaux from Leija." Pet. App. 19a.

As Leija's car came into view, Mullenix saw the same thing that the other officers had been observing: Leija was driving straight down the highway. *See* ROA 867 (Rodriguez's Dash Camera). Leija drove without indicating that he was aware of Ducheneaux's presence or the spikes that lay ahead. *See id.* at 15:30-16:00. It is uncontested that Leija posed no threat to Mullenix. *See* ROA 745.

As Leija approached the overpass, but before he reached the spikes, Mullenix rapidly fired six rounds

down into Leija's car. Pet. App. 5a. "The evidence indicates that at least four of Mullenix's six shots struck Leija's upper body." *Id.* 6a. There is "no evidence" that Mullenix hit the vehicle's engine block. *Id.* Leija then lost control of the car, and it flipped numerous times before coming to a halt. Mullenix proclaimed, "That ought to do it." Mullenix Dash Cam. at 12:00.

Leija died from his bullet wounds. Officers did not find a weapon in his car. Meanwhile, referencing his earlier performance review, Mullenix quipped to Sergeant Byrd, "How's that for proactive?" Pet. App. 5a-6a.

A lieutenant with the DPS Office of the Inspector General (OIG) investigated the shooting. After several months, the OIG issued a report finding that in light of "the amount of time" Mullenix had to assess the situation, he acted "without due regard for the safety of [Ducheneaux] or Leija." ROA 865-66. The OIG concluded, therefore, that Mullenix's use of deadly force was "reckless" and "Not Justified." *Id.* at 866.[3]

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[3] In his deposition, the lieutenant who authored the report tried to back away from some of his earlier conclusions. ROA 942-45. Petitioner also has objected to the admissibility of the OIG report, claiming that it "was based on inadequate information, is not reliable, is not relevant, was not properly authenticated, and lacks foundation." *Id.* 904. The district court has not ruled on this scattershot objection, and the Fifth Circuit saw no need to consider the report, Pet. App. 24a n.3. But because summary judgment could not be granted against respondents without considering the report or declaring it inadmissible, respondents reference it in this brief.

B. Procedural History

1. Respondents Beatrice Luna, as the representative of Leija's estate, and Christina Flores, acting on behalf of Leija's seven- and nine-year-old children, brought excessive force claims against petitioner under 42 U.S.C. § 1983. *See* ROA 23-36.[4] Following discovery, petitioner moved for summary judgment, claiming qualified immunity. *Id.* 456.

The district court concluded that genuine issues of material fact precluded summary judgment. Pet. App. 37a. In particular, the court noted that further litigation was needed to determine whether, at the time of the shooting, Mullenix reasonably believed that Leija's actions presented an immediate threat to either officers or the public. *Id.*

2. The Fifth Circuit affirmed. Following this Court's lead in *Scott v. Harris*, 550 U.S. 372 (2007), the Fifth Circuit independently reviewed the video from the pursuit. Pet. App. 14a. The court of appeals concluded the footage comported with respondents' account of the chase. *Id.*

Viewing the totality of the evidence in the light most favorable to respondents, the Fifth Circuit concluded that none of the risk factors in *Scott* were present. Pet. App. 13a-14a. In particular, the court of appeals noted that Leija's driving had not posed a serious risk to any other drivers and that petitioner did not know where Ducheneaux was or indicate he

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[4] Respondents also brought federal and state claims against other defendants. ROA 23-36. These claims have all been withdrawn or dismissed. *See id.* 249, 451, 455, 982.

believed Ducheneaux faced any risk. *Id.* 18a-19a. Nor did Leija's claim about having a weapon pose a "sufficiently imminent" threat "at the moment of the shooting." *See id.* 18a. The court therefore held that the facts as thus far developed "do not establish that [petitioner] perceived an immediate threat at the time of the shooting, sufficient to justify the use of deadly force." *Id.* 19a-20a.

In light of the long-standing prohibition against using deadly force when suspects do not pose an imminent threat to others, the Fifth Circuit further concluded that petitioner was not entitled to summary judgment on qualified immunity grounds. Pet. App. 21a-24a.

Judge King dissented. She acknowledged that it was a "close case" whether Mullenix "violated clearly established Fourth Amendment law" and that holding he did could be seen as "a fair, responsible decision." Pet. App. 92a. But she concluded that Mullenix's actions were not objectively unreasonable. *Id.* 79a.

The Fifth Circuit denied Mullenix's petition for rehearing and rehearing en banc. Pet. App. 40a. In the process, the panel substituted its original opinion with one clarifying the standard of review. *Id.* 2a. Judges Jolly and King authored dissents from the denial of rehearing. *Id.* 40a, 51a.

REASONS FOR DENYING THE WRIT

This case involves the application of settled law to unsettled facts. Faced with a claim of an unconstitutional use of deadly force against a fleeing motorist, the Fifth Circuit identified and applied this Court's well-developed jurisprudence to an

indeterminate record. The court of appeals' fact-intensive analysis is sound, and it does not conflict with the law in any other court of appeals. Furthermore, in light of recent police shootings, many law enforcement agencies are rethinking their protocols on the use of deadly force. This Court should await these developments before considering the reasonableness of a response to any particular factual scenario.

I. The Fifth Circuit's Decision Is Consistent With This Court's Precedents.

A. The Fifth Circuit Correctly Held On The Current Record That Petitioner's Use Of Deadly Force Violated The Fourth Amendment.

This Court already has well-developed Fourth Amendment law concerning the use of deadly force during high-speed car chases, and the Fifth Circuit's jurisprudence on the subject comports with that guidance.

1. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court made clear that "[i]t is not better that all felony suspects die than they escape." *Id.* at 11. Instead, courts confronted with deadly force claims must consider whether the "officer ha[d] probable cause to believe that the suspect pose[d] a threat of serious physical harm." *Id.* When a person fleeing from the police poses "no immediate threat to the officer and no threat to others," the use of deadly force violates the Fourth Amendment. *Id.*

This standard requires courts to "slosh [their] way through the factbound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 383 (2007). In *Scott*,

for example, another case involving a car chase, the Court weighed "the risk of bodily harm that [the officer's] actions posed to [the suspect] in light of the threat to the public that [the officer] was trying to eliminate." *Id.* The Court reviewed a video shot from the officer's dashboard and noted that the motorist was "racing down narrow, two-lane roads," ran multiple red lights, and "force[d] cars traveling in both directions to their respective shoulders to avoid being hit." *Id.* at 379. Thus, the Court held the officer's use of deadly force was reasonable because the high-speed pursuit "posed a substantial and immediate risk of serious physical injury." *Id.* at 386.

Similarly, in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), a suspect "passed more than two dozen other vehicles, several of which were forced to alter course," *id.* at 2021, and "swerve[ed] through traffic at high speeds," *id.* at 2017 (citation and internal quotation marks omitted). The suspect also hit multiple police vehicles and accelerated into a police car while flush against its bumper. *Id.* at 2017, 2021. The Court held that the officer's use of deadly force was reasonable because it was "beyond serious dispute that [the suspect's] flight posed a grave public safety risk." *Id.* at 2022.

2. In this case and others, the Fifth Circuit has followed this Court's instruction that this legal framework turns on highly fact-intensive analysis. For example, in *Thompson v. Mercer*, 762 F.3d 433 (5th Cir. 2014) – issued five months before the decision below – the Fifth Circuit held that an officer who used deadly force to end a car chase did not violate the Fourth Amendment. *Id.* at 439. The court of appeals assessed "the threat to the public," *id.* at

438 (emphasis omitted) (quoting *Scott*, 550 U.S. at 383), including the "inherent danger of vehicular flight," *id.* at 439 (internal quotation mark omitted). The police there, as here, believed the suspect was armed and watched him exceed 100 miles per hour while driving down rural roads. *See id.* at 436. But the suspect had also stolen a car with the occupant still in it, drove the wrong way down the road, and forced other motorists to pull off. *Id.* at 436-39. Furthermore, the officer who used deadly force was the last one who could stop the suspect before he reached a town. *Id.* at 440.

In this case, by contrast, the Fifth Circuit's fact-specific inquiry revealed that, for purposes of summary judgment, petitioner did not have probable cause to believe Leija posed an imminent threat to the general public or officers. For starters, there were no pedestrians, businesses, or residences by the highway. Pet. App. 15a-16a; *see also* ROA 719-721. Nor – in contrast to *Scott* and *Plumhoff* – had Leija passed many other cars, much less run any off the road. Pet. App. 13a. Thus, numerous higher-ranking officers, including petitioner's direct supervisor, had settled on a plan to use spike systems. *See id.* 20a-21a. As the Fifth Circuit put it, "There is no evidence any other officer , hearing the same information [petitioner] heard, including the information regarding Leija's threats, decided that deadly force was necessary or warranted." *Id.* 20a. To the contrary, petitioner's superior ordered him to "stand by" and "wait and see if the spikes work." *Id.* 5a.

Viewing the facts in respondents' favor, petitioner intentionally disregarded that plan. Even though he had no training in shooting moving vehicles,

petitioner decided to try to disable Leija's car by firing six rounds at it just seconds before it was set to reach the spikes. *See* Pet. App. 4a. If the jury accepts this version of the facts, it could reasonably find – as the police department's own inspector general did – that the "risk of bodily harm" from shooting was unnecessarily high compared to "the threat to the public that [petitioner] was trying to eliminate," *Scott*, 550 U.S. at 383. *See also supra* at 5 (discussing OIG report).

Nothing about Officer Ducheneaux's presence at the scene alters this calculus. Petitioner claims that he "did not actually know Ducheneaux's position or what he was doing beneath the overpass." *See* Pet. 20 (citation and internal quotation marks omitted). But petitioner was not rushed. He had time to check on Ducheneaux's status, yet he discussed Ducheneaux's presence with the nearby deputy only in regard to whether "*he* would hit [Ducheneaux]; he did not indicate that he perceived a threat to Ducheneaux from Leija," Pet. App. 19a. Furthermore, the Fifth Circuit found that petitioner *did* know officers were trained to take protective positions after deploying spikes. *Id.* 19a; *see also* ROA 739-40. Petitioner also knew the overpass had concrete pillars that could be used for cover. ROA 740. Therefore, petitioner could believe Ducheneaux was exposed only if he assumed that the officer had disregarded his training. Under these circumstances, a jury could find that the threat to Ducheneaux was too attenuated "at the time of the shooting to justify deadly force," Pet. App. 20a.

Nor did the Fifth Circuit "minimize[]" Leija's threats to shoot police officers. *See* Pet. 18. It simply

refused to hold categorically that a threat *always* green-lights the use of deadly force, reasoning that "allegedly being armed and in a car fleeing are not, *by themselves*, sufficient" to enable the use of such force. Pet. App. 16a-17a (emphasis added). That being so, the Fifth Circuit properly turned to the "factual scenario here" and distinguished this case from others where it had held that officers who shot at "suspect[s] believed to be armed" did not violate the Fourth Amendment. *Id.* 17a.

3. In addition to attacking the Fifth Circuit's reasonableness analysis, petitioner accuses the Fifth Circuit of holding categorically that "the Fourth Amendment forbids an officer to use deadly force against a fleeing suspect unless and until alternative, non-deadly means have failed." Pet. 2. Not so. The Fifth Circuit simply considered the fact that alternative means were already in place as one among many factors that "undermin[ed] the asserted necessity for resorting to deadly force at that particular instant." Pet. App. 21a. It did not hold that deploying tire spikes or any other tactic is a necessary precondition to shooting at a fleeing vehicle.

Not even petitioner maintains that the availability of alternative means cannot be a *factor* in assessing reasonableness. Nor could he. In *Scott*, Justice Ginsburg made clear that "relevant considerations" under the Court's car-chase jurisprudence include whether there was a "safer way, given the time, place, and circumstances, to stop the fleeing vehicle." 550 U.S. at 386 (Ginsburg, J., concurring). Likewise, other courts of appeals have held that "the availability of alternative methods of

capturing or subduing a suspect may be a factor to consider" in the excessive force inquiry. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005); *see also Retz v. Seaton*, 741 F.3d 913, 918 (8th Cir. 2014) ("Depending on the circumstances, the 'perspective' of a reasonable officer may include consideration of alternative courses of action available at the time force was used.").[5]

B. The Fifth Circuit's Refusal To Order Summary Judgment On Qualified Immunity Grounds Is Consistent With This Court's Precedent.

1. The Fifth Circuit enunciated and applied this Court's standard that, to defeat qualified immunity, the constitutional right at issue "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Pet. App. 21a (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (internal quotation mark omitted). As the Fifth Circuit also recognized, this inquiry revolves around whether the official had "'fair warning'" that the conduct at issue was unlawful. *Id.* 22a (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). The Fifth Circuit followed this Court's instruction, putting the "focus . on whether the officer had fair notice" in the specific context of the case at hand that his

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[5] One of petitioner's amici suggests that petitioner's superiors might have underestimated the danger that tire spikes themselves presented. *See* Br. of Nat'l Ass'n of Police Orgs. 15-16. If petitioner wishes to argue that using spikes is comparably dangerous to firing a semiautomatic rifle down upon a car, he may try to prove that at trial.

conduct was unlawful. *Id.* 21a-22a (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

2. The Fifth Circuit held that at the time of the events here, it was "clearly established" that an officer violates the Fourth Amendment by "shooting a suspect fleeing in a motor vehicle" absent a "sufficient threat of harm to the officer or others." Pet. App. 22a-23a (quoting *Lytle v. Bexar Cty.*, 560 F.3d 404, 417-18 (5th Cir. 2009), *cert. denied*, 559 U.S. 1007 (2010)). Petitioner's attacks on this application of settled qualified-immunity principles to the particulars of this case do not warrant certiorari.

a. Long before the shooting here, this Court made clear that the use of deadly force is permissible only when the "officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). This Court had also applied this reasonableness test to fleeing motorists, measuring an officer's actions against whether the motorist "posed a substantial and immediate risk of serious physical injury to others." *Scott v. Harris*, 550 U.S. 372, 386 (2007); *see also id.* at 383-86.

Contrary to petitioner's argument, this rule was not too "general" to provide fair notice that petitioner's conduct would violate the Fourth Amendment. *See* Pet. 22-25. When "prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights," those decisions provided the requisite "fair warning," even when there are "notable factual distinctions" between prior case law and the case at hand. *Hope*, 536 U.S. at 740

(quoting *United States v. Lanier*, 520 U.S. 259, 269 (1997)).

That is the situation here. Viewing the evidence in the light most favorable to respondents, Leija did not, at the moment of the shooting, "pose[] a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11; *see supra* at 10-12. While *Garner* involved a suspect fleeing on foot instead of in a car, Leija's driving did not pose so much of a greater threat as to deprive petitioner of fair warning of the governing law: that deadly force is unreasonable when the suspect poses "no immediate threat," *Garner*, 471 U.S. at 11.

To be sure, this Court held in *Brosseau* that *Garner*'s test did not provide sufficient warning that shooting a suspect who was attempting to flee in a car was unlawful. 543 U.S. at 199. But this Court later made clear that plaintiffs in respondents' position could "defeat immunity" by showing that "the officer's conduct in [their] case was materially different from the conduct in *Brosseau*." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). And unlike *Brosseau*, where the police confronted a "disturbed felon" who refused to respond to repeated warnings from an officer pointing a firearm in his face, the police never warned Leija that they would use deadly force. *See Brosseau*, 543 U.S. at 196, 200. Nor, in contrast to *Brosseau*, had Leija been involved in a fight immediately prior to the officer's arrival or physically struggled with a police officer over the keys to his getaway vehicle. *See id.* at 195-96. Nor was Leija in a crowded residential area or about to drive into a small car occupied by a three-year-old. *See id.* at 196.

At bottom, the level of particularity petitioner demands would amount to giving "one free shot" to every officer who was the first to use deadly force in any new permutation of facts. *Cf. Virginia v. Harris*, 558 U.S. 978, 981 (2009) (Roberts, C.J., dissenting from denial of writ of certiorari) ("The effect of the rule below will be to grant drunk drivers 'one free swerve' before they can legally be pulled over by the police."). Even when all other officers involved in a pursuit (as well a reviewing agency) realized in the new situation that using deadly force was "Not Justified," ROA 866, an officer would be able to insulate himself from trial based on ultimately insignificant factual distinctions. This is not the law.

b. Even if a reasonable officer in petitioner's shoes needed more fine-grained notice to know that firing at Leija's car would be unconstitutional, courts had held at the time of the events here that officers' conduct in analogous circumstances violated the Fourth Amendment. *See* Pet. App. 22a-23a. In *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009), *cert. denied*, 559 U.S. 1007 (2010), an officer fired on a fleeing motorist who had already collided with one vehicle during the chase and was on bond for felony theft and unlawful possession of a firearm. *Id.* at 407-08. Even though the officer knew the suspect had a history with weapons and could continue the car chase, the Fifth Circuit held that his use of force violated clearly established law because "no one was in immediate danger." *Id.* at 416-17.

In holding that the officer acted unreasonably, *Lytle* stressed it was in line with a consensus among the courts of appeals. 560 F.3d at 415-16 (citing cases). For example, in *Kirby v. Duva*, 530 F.3d 475

(6th Cir. 2008), officers confronted a fleeing motorist whom the officers knew to be "a violent, paranoid individual" who owned numerous weapons and "opened the door to his home only with a pointed gun." *Id.* at 477. Yet, in *Kirby* – as with this case – the use of deadly force violated the potentially armed suspect's "clearly established" Fourth Amendment rights because there was no "*immediate* danger to anyone," *id.* at 483 (emphasis added).

Other courts prior to 2010 likewise had consistently denied qualified immunity in car chase cases because there was no immediate threat. *See, e.g., Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009) ("*Scott* did not declare open season on suspects fleeing in motor vehicles." (citation and internal quotation mark omitted)); *Adams v. Speers* 473 F.3d 989, 991 (9th Cir. 2007) (ninety-minute long car chase); *Vaughan v. Cox*, 343 F.3d 1323, 1326-27 (11th Cir. 2003) (85-mile-per-hour chase after colliding with a police cruiser). So too in other cases involving potentially armed suspects because the threats to police were not imminent. *See, e.g., Meadours v. Ermel*, 483 F.3d 417, 423 (5th Cir. 2007) (denying qualified immunity for officers who shot a mentally ill man who threatened officers with a sharp object); *O'Bert v. Vargo*, 331 F.3d 29, 33 (2d Cir. 2003) (same for officers who shot a suspect resisting arrest who had threatened to shoot them).

II. The Fifth Circuit's Decision Does Not Conflict With The Law In Any Other Court Of Appeals.

A. Fourth Amendment Violation

Like the Fifth Circuit, other circuits have held that officers may not use deadly force in the absence of an imminent threat – including in a case that this Court declined earlier this term to review. *See, e.g.*, *Gonzalez v. City of Anaheim*, 747 F.3d 789, 797 (9th Cir.) (en banc) (officer who shot driver of minivan violated Fourth Amendment when there was no immediate danger and alternative means were available), *cert. denied sub nom. Wyatt v. F.E.V.*, 135 S. Ct. 676 (2014); *Waterman v. Batton*, 393 F.3d 471, 482 (4th Cir. 2005) (officers were unjustified in continuing to shoot at a fleeing car after the car had driven past the officers and no longer posed a threat); *Cowan v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003) (officer who shot at oncoming car violated Fourth Amendment because officer was not in car's path).

The law in the Eleventh, Sixth, First, and Eighth Circuits is not to the contrary. The cases that petitioner cites from those circuits reflect the fact-intensive nature of excessive force cases, not any disagreement about the law.

Eleventh Circuit: In the Eleventh Circuit, as in the Fifth Circuit, the use of deadly force against a fleeing motorist is justified only when the motorist poses an imminent threat. For example, in petitioner's cited case, *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007), the Eleventh Circuit held that an officer's decision to shoot at a person who was driving away in the officer's police cruiser was reasonable. *Id.* at 583. The court emphasized three key factors:

the driver was known to be mentally unstable and suffering from a "psychotic episode," *id.* at 578; the officer had warned the driver that he would use deadly force; and "fully equipped police cruiser[s]" pose a special danger compared to regular cars. *Id.* at 581-82. Because "the time to think [was] short," these facts – all absent here – established that the need for deadly force at that moment was particularly pressing. *Id.* at 583.[6]

On the other hand, the Eleventh Circuit – just like the Fifth Circuit – will find a Fourth Amendment violation when the fleeing motorist did not pose an imminent threat at the time deadly force was used. For example, in *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), which this Court distinguished in *Scott v. Harris*, 550 U.S. 372, 384 (2007), and *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2024 (2014), the Eleventh Circuit denied summary judgment to an officer who shot a fleeing truck. 343 F.3d at 1330. The truck was travelling at over 85 miles per hour, had evaded a "rolling roadblock," and collided with the back of a police cruiser. *Id.* at 1326-27. The court of appeals nonetheless held that the facts could show that the driver posed no threat to the officer or any other

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[6] Petitioner additionally relies on *Quiles v. City of Tampa Police Department*, 596 Fed. Appx. 816 (11th Cir. 2015). Pet. 30. This is an unpublished case that is not precedential in the Eleventh Circuit. *See* 11th Cir. R. 36-2 (2014). In any event, the suspect in *Quiles* – who was fleeing on foot – presented an imminent threat because he had just physically fought with a police officer and it appeared that he had stolen that officer's gun. *See* 596 Fed. Appx. at 819.

motorists when, without warning, the officer fired on the truck. *Id.* at 1330-31.

Sixth Circuit: The law in the Sixth Circuit is no different: deadly force is justified only when a motorist presents an imminent threat. That was the case in *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014), which petitioner cites. There, the fleeing motorist had been blocked by police cars when an officer approached the car, drew his weapon, and ordered the driver to stop. *Id.* at 372. The driver instead accelerated toward and hit the officer, then hit a second officer, causing the second officer to accidentally discharge his weapon. *Id.* Hearing gunfire and believing that other officers were in danger, the first officer made a split-second decision to fire at the car. *Id.* at 372-73. Given this imminent threat, the Sixth Circuit held that the use of deadly force was reasonable. *Id.* at 376.

At the same time, the Sixth Circuit, like the Fifth Circuit, will find a Fourth Amendment violation when the threat is not imminent. In *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), for example, the court held that an officer may have violated the Fourth Amendment when he rammed his car into a fleeing motorcycle, killing the rider, because the facts could show that the rider "posed no immediate threat to anyone." *Id.* at 503; *see also Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005) (denying summary judgment for officer who fired at a suspect who was driving off in the officer's squad car because jury could find that the officer was no longer in the car's path).

First Circuit: Though the First Circuit has not addressed a case comparable to this one, there is no reason to think that it would come to a different

outcome if it did. Petitioner's cited case, *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), involved an immediate threat: the fleeing motorist accelerated toward first the shooting officer and then his partner. *See id.* at 23. The driver did so after leading the officers on a high-speed chase through city streets, weaving erratically, and occasionally driving in the wrong direction. *Id.* at 22-23. In the split-second the officer had to act, the driver posed an "imminent threat" to the shooting officer's life and his partner's. *See id.* at 29.

Eighth Circuit: The Eighth Circuit also has not considered a case like this one, though again there is no reason to think it would disagree with the Fifth Circuit. Petitioner's cited cases, *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), and *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), both stressed imminent threats not present here.

In *Loch*, which did not involve a car chase, the Eighth Circuit held that an officer was justified in using deadly force against a suspect the officer reasonably believed was reaching for a weapon. 689 F.3d at 964, 966. Deadly force was similarly justified in *Cole*, where the officer – after warning the driver that he would shoot – fired on a fleeing eighteen-wheeler. 993 F.2d at 1330-33. By the time of the shooting, the driver had clearly demonstrated his disregard for the safety of the police and others on the crowded interstate by forcing "more than one hundred cars" off the road, ramming into police cars, and evading other means of ending the chase. *Id.* at 1331.

B. Denial Of Qualified Immunity

Like the Fifth Circuit, several other circuits have denied qualified immunity at the summary judgment stage in circumstances similar to those here. *See supra* at 17 (collecting other such cases). As with petitioner's claimed Fourth Amendment split, his alleged qualified immunity split is founded on cases that are easily distinguishable as they involved more immediate and substantial threats to officers than the attenuated threat here.

D.C. Circuit: In *Fenwick v. Pudimott*, 778 F.3d 133 (D.C. Cir. 2015), the D.C. Circuit held that – in part because that court had no previous law on the subject – it was not clearly established as of 2007 that it was unreasonable to shoot a fleeing car that moments before had accelerated towards officers and had hit one of them. *Id.* at 137. The court indicated, however, that had the threat to the officers clearly passed by the moment of shooting, the shooting could have been unreasonable under the law at the time. *See id.* at 139-40. Were the D.C. Circuit to have considered the facts here, therefore, its decision likely would have been the same as the one below.

Tenth Circuit: Similarly, in *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009), the Tenth Circuit held that it was not clearly established as of 2006 that the officer could not shoot at a fleeing truck that posed a "substantial but not imminent" threat to the public. *Id.* at 1189, 1192. There, the driver had exhibited a clear disregard for others by driving off the road, driving down the wrong side of an interstate, running two red lights, and avoiding alternative means of ending the chase. *See id.* at 1186. However, at the moment of shooting, there

were no other motorists in the immediate vicinity, and it was disputed whether the shooting officer was in the truck's path. *Id.* at 1187. The Tenth Circuit reasoned that the case fell between *Scott v. Harris*, 550 U.S. 372 (2007), and *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), and therefore held that the lawfulness of the use of force had not been clearly established. *Cordova*, 569 F.3d at 1192-93. Presented with the facts of this case, which are closer to those in *Vaughan*, the Tenth Circuit in 2006 may well have held that the officer was not entitled to qualified immunity.

In any event, *Cordova* held that the officer's use of deadly force was unreasonable. 569 F.3d at 1195. As a result, as of June 2009 – nine months before the events in this case – the Tenth Circuit had established that the Fourth Amendment prohibits shooting at a fleeing vehicle that poses a substantial but not imminent threat. Thus, if it had been deciding this case, the Tenth Circuit would have come to the same conclusion as the Fifth Circuit.

III. This Case Is A Poor Vehicle For Providing Guidance On The Use Of Deadly Force During Car Chases.

This Court already has a well-developed body of case law concerning the use of deadly force. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985). Several of those cases specifically involve car chases, including one from just last term. *See Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Scott v. Harris*, 550 U.S. 372 (2007); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). Given the anomalous facts of this case and the changing nature of police protocols, taking

another "slosh" through the doctrine of reasonableness at this time, *see Scott*, 550 U.S. at 383, would not provide helpful guidance to officers or lower courts in the mine-run of cases.

1. Anomalous facts. In the typical deadly force case, officers need to make decisions based on near-instantaneous assessments of the imminence of threats. *See, e.g., Plumhoff*, 134 S. Ct. at 2020; *Graham*, 490 U.S. at 396-97. Accordingly, this Court has long instructed that assessing the reasonableness of a challenged use of force "must embody allowance for the fact that police officers are often forced to make split-second judgments." *See Graham*, 490 U.S. at 396-97. And qualified immunity similarly protects such snap judgments, even if they later turn out to have been mistaken, because it is undesirable to require police officers to equivocate when delay "would gravely endanger their lives or the lives of others," *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967).

Here, however, the circumstances of petitioner's decision to use deadly force are highly unusual. Petitioner was eager to use his rifle even before getting to the overpass or observing any part of the pursuit himself. *Supra* at 3-4. Once there, petitioner had three minutes with a working radio to determine if the threat to Officer Ducheneaux actually justified deadly force. *Id.* Instead, he disobeyed a direct order from his commanding officer, ignored a plan others had put in place, and attempted a challenging rifle shot he had no training in executing. *Id.* Citing "the amount of time" that petitioner had before shooting, the OIG report concluded that "the evidence does not justify [petitioner's] actions." ROA 866.

There is little to be gained by reviewing petitioner's renegade actions.

2. Changing protocols. In light of recent high-profile police shootings – and the extensive publicity surrounding them – law enforcement agencies have been re-evaluating their protocols on the use of deadly force. *See, e.g.*, Pervaiz Shallwani et al., *Police Move to Revamp Tactics*, Wall St. J., Dec. 5, 2014, at A1. Among other things, agencies are reassessing some of the accepted rationales for using force at earlier stages of an engagement. Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, N.Y. Times, May 5, 2015, at A1; Mitch Smith & Matt Apuzzo, *Police in Cleveland Accept Tough Standards on Force*, N.Y. Times, May 27, 2015, at A1 (describing new Cleveland police policy restricting use of force as a "model" for other departments). In rethinking how and when they use deadly force to engage with threats, agencies are adjusting their tactics and are generally moving towards de-escalation. Shallwani, *supra*.

Because of these trends, future police responses to situations like this one may be very different from the officers' actions here. And the resulting reasonableness analysis may differ as well. *See, e.g.*, *Garner*, 471 U.S. at 10-11 (giving "substantial" weight to police department policies concerning use of deadly force). This Court, therefore, should wait for a case that concerns police behavior resulting from this realignment – and more typical facts – to provide lasting guidance for law enforcement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY, PETITIONER

v.

BEATRICE LUNA, INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.;
CHRISTINA MARIE FLORES, AS NEXT FRIEND OF
J.L. AND J.L., MINOR CHILDREN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI
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REPLY BRIEF FOR THE PETITIONER

The Fifth Circuit's opinion creates two separate circuit splits and contravenes this Court's recent decisions on qualified immunity. Respondents' arguments ignore an undisputed, crucial fact: the suspect called police dispatch stating that he had a gun and threatening—twice—to shoot police officers. Because this fact is undisputed, this case is an ideal vehicle for providing guidance on when the Fourth Amendment allows police to use deadly force during high-speed car chases where the suspect threatens to shoot police. At a minimum, no clearly established law prohibited Officer Mullenix from using deadly force to prevent the

suspect from carrying out his threat to shoot fellow officers.

The Court has summarily reversed multiple decisions denying qualified immunity on the basis that no clearly established law existed. This case, too, warrants the Court's review, as the Fifth Circuit's unprecedented limitation on the use of force will prevent police from protecting the public.

I. THE COURT OF APPEALS' ERRONEOUS FOURTH AMENDMENT HOLDING CREATES A CIRCUIT SPLIT.

A. Respondents try to evade the circuit split on the Fourth Amendment question (Pet. 29–33) and the conflict with *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) (Pet. 14–17), by pretending that the suspect Leija was not an imminent threat. But Respondents ignore two important facts: Leija threatened to shoot police officers, and operating tire spikes puts police in harm's way.

1. Ignoring Leija's affirmative threat to shoot police officers, Respondents claim that "Leija did not, at the moment of the shooting, 'pose[] a threat of serious physical harm, either to the officer or to others.'" Br. in Opp. 15 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). But it is undisputed that Leija threatened to shoot police and was driving at high speeds as police pursued him. Pet. App. 26a–27a. The fact that Leija threatened to shoot police, alone, would give any reasonable officer in Mullenix's position probable cause to believe that Leija posed a risk of serious harm

to Officer Ducheneaux as well as other officers and citizens down the road.

Respondents try to remove this fact from the analysis—like the court of appeals—by characterizing Leija as "allegedly . armed and in a car fleeing." Br. in Opp. 12. Leija was not just allegedly armed; he affirmatively called police dispatch, twice threatening to shoot police officers.

Consequently, the cases forming the basis of the circuit split—*McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014), *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), and *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007)—cannot be distinguished on the ground that they involved "imminent threats not present here." Br. in Opp. 21. Leija did present an imminent threat: it is undisputed that he threatened to shoot police in the midst of a high-speed car chase. It follows from the reasoning of each of these cases that Officer Mullenix's action was objectively reasonable, and this case would have been decided differently in those circuits.

Likewise, Respondents cannot avoid this circuit split by citing cases in which the threat had clearly passed at the time of shooting, *see Waterman v. Batton*, 393 F.3d 471, 482 (4th Cir. 2005), or cases involving genuine disputes about the underlying material facts, *see Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (en banc); *Cowan v. Breen*, 352 F.3d 756 (2d Cir. 2003); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003). *See* Br. in Opp. 18–20.

2. Having ignored Leija's threats, Respondents also disregard the serious risk of harm to officers setting out tire spikes. As amici explain, tire spikes are neither foolproof nor safe. Even if fleeing suspects do not simply drive around the spikes—which they often do—they may continue to drive for long periods on damaged tires, increasing the risk of harm to other vehicles. Br. of Amici Curiae Nat'l Ass'n of Police Orgs. & Nat'l Sheriffs' Ass'n 16. Worse yet, officers using tire spikes are routinely injured or killed, sometimes intentionally by fleeing suspects. *Id.* at 3–4, 15–16. For example, less than one month ago, a Houston police officer died while setting out spike strips when the fleeing suspect swerved to hit him.[1]

Unable to deny that operating tire spikes puts officers at risk, Respondents attempt to discount the risk to Officer Ducheneaux by speculating that he *must* have been safe because he was trained to take cover. Br. in Opp. 11. The Fourth Amendment did not require Mullenix to engage in similar speculation. Nor could a jury find that the threat to Ducheneaux was "too attenuated 'to justify deadly force,'" *id.*, even if the speculated facts were proven. First, that information could not factor into the analysis because it was not available to Mullenix, who was on the over-

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[1] *See* Rebecca Elliott & Dale Lezon, *HPD officer killed placing spike strips during police chase*, Hous. Chron., May 18, 2015, http://www.houstonchronicle.com/news/houston-texas/houston/article/HPD-officer-killed-placing-spike-strips-during-6271846.php.

pass above Ducheneaux. Whether Mullenix acted unreasonably must be determined based on his perspective, not "the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Second, a jury would not decide whether Mullenix's use of force was "justified," in any event. The question is whether he acted *reasonably* under the circumstances; that is "a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007).

Perhaps because it misperceived the relative costs and benefits of tire spikes, the court of appeals created a circuit split by holding, in effect, that officers may not use potentially deadly force until alternative means have been exhausted. Respondents deny any such holding. Br. in Opp. 12. But if the court of appeals' decision were allowed to stand, no reasonable officer would attempt to stop a fleeing suspect when tire spikes might be in place. By imposing a duty to stand down until alternatives have been exhausted, the court of appeals parted ways with other circuits. *See* Pet. 29–33; *see, e.g.*, *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008) ("[T]he Fourth Amendment does not require officers to use the best technique available as long as their method is reasonable under the circumstances."); *Long*, 508 F.3d at 576 ("Even if Deputy Slaton's decision to fire his weapon was not the best available means of preventing Long's escape and preventing potential harm to others, we conclude that Slaton's use of deadly force was not an unreasonable means of doing so."); *see generally Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994) ("There is no

precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first.").

B. Ignoring the serious threat Leija posed (and made) as he approached Officer Ducheneaux, Respondents attempt to shift the focus to Mullenix's state of mind. But Mullenix's subjective intentions are irrelevant. "[T]he Fourth Amendment regulates conduct rather than thoughts." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011). If "the circumstances, viewed objectively, justify [the challenged] action," that action is "reasonable *whatever* the subjective intent motivating the relevant officials." *Id.* (internal quotation marks omitted).

In all events, Respondents' attempt to paint Mullenix as a "renegade" officer fails for at least two reasons. Br. in Opp. 25. First, Respondents embrace the court of appeals' erroneous statement that no other officer agreed with Mullenix's conduct. *Id.* at 10. Respondents ignore the undisputed fact that Officer Rodriguez—the person following Leija and therefore most familiar with the situation—responded "10-4" when Mullenix proposed shooting at Leija's engine. Pet. App. 4a; *see also* Pet. App. 87a n.2 (King, J., dissenting) (noting that "Mullenix discussed his plan to

shoot at Leija's vehicle with two other officers involved in the pursuit—Rodriguez and Shipman—neither of whom made any effort to dissuade him").

Second, Respondents tout the DPS Office of the Inspector General (OIG) report as an official condemnation of Mullenix's action, but that is not the case. The court of appeals recognized (and Respondents ignore) that the OIG report "was subsequently called into question by its author, who testified that he did not have full information on the incident or investigation when he wrote the report." Pet. App. 6a. In fact, once the author had full information, he concluded that Mullenix's use of force was justified. CA5 Record 943. The court of appeals did not rely on the OIG report, and it found no indication that the district court did so. Pet. App. 24a n.3. Respondents also fail to mention that separate investigations by the Texas Rangers and the DPS Firearms Discharge Review board "concluded that Mullenix complied with DPS policy and Texas law." Pet. App. 6a.

Respondents' attempt to impugn Officer Mullenix is not only inaccurate but also irrelevant. That he allegedly lacked training or violated department policy, even if true, would not establish a Fourth Amendment violation. *Cf.* Br. in Opp. 3, 10, 24–25; *see City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) ("Even if an officer acts contrary to her training, that does not itself negate qualified immunity where it would otherwise be warranted."). After all, the controlling question is whether "a reasonable of-

ficer could have believed that his conduct was justified." *Id.* Mullenix's failure to heed Sergeant Byrd's advice to wait for the spikes (assuming that Mullenix heard it, as the Court must in this summary-judgment posture) is also irrelevant. *See Scott*, 550 U.S. at 375 n.1 ("It is irrelevant to our analysis whether Scott had permission to take the precise actions he took.").[2]

II. THE COURT OF APPEALS' HOLDING ON CLEARLY ESTABLISHED LAW SHOULD BE REVERSED.

The court of appeals created a separate circuit split on the second question presented regarding clearly established law. Pet. 33–34. But even if there were no circuit split, its error subjecting Officer Mullenix to a trial would still warrant review.

This Court has frequently reversed—often summarily—in qualified-immunity cases, even in the absence of a circuit split. As the Court explained last month in *Sheehan*, "Because of the importance of qualified immunity to society as a whole, the Court often corrects lower courts when they wrongly subject individual officers to liability." 135 S. Ct. at 1774 n.3 (internal citation and quotation marks omitted) (citing *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Plumhoff*, 134 S. Ct. 2012; *Stanton v. Sims*, 134 S. Ct. 3 (2013)

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[2] Undisputed testimony from multiple witnesses, including Sergeant Byrd, establishes that Mullenix, as the "officer on the scene," was responsible for the decision whether to use force. Pet. App. 83a n.1 (King, J., dissenting).

(per curiam); *Reichle v. Howards*, 132 S. Ct. 2088 (2012)).

Indeed, earlier this month, the Court cited *Sheehan* in summarily reversing a qualified-immunity decision, holding that the law was not clearly established "in a way that placed beyond debate the unconstitutionality" of the defendant's actions. *Taylor v. Barkes*, No. 14-939, 2015 WL 2464055, at *2–3 (U.S. June 1, 2015) (per curiam).

Sheehan recognized that "[this Court] ha[s] repeatedly told courts not to define clearly established law at a high level of generality." 135 S. Ct. at 1775–76 (quoting *al-Kidd*, 131 S. Ct. at 2084). Like the Ninth Circuit in *Sheehan*, the court of appeals erred by defining clearly established law at a high level of generality. It held that any reasonable officer would have known Officer Mullenix's conduct was unconstitutional given the clearly established principle that "it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." Pet. App. 22a; *but see Cordova v. Aragon*, 569 F.3d 1183, 1193 (10th Cir. 2009) (noting that this general principle "begs the question of what constitutes a *sufficient* threat"). Yet as in *Sheehan*, no precedent clearly established that the threat Leija presented—based on his explicit threat to shoot police officers and his imminent arrival at Officer Ducheneaux's position during a high-speed car chase—was not sufficient to justify Mullenix's attempt to stop Leija's car. The generic principle that deadly force is unreasonable absent "a sufficient

threat of harm" did not provide fair notice that Officer Mullenix's conduct violated the Constitution, let alone "place[] the constitutional question beyond debate." *Reichle*, 132 S. Ct. at 2093; *see Taylor*, 2015 WL 2464055, at *2; *cf. Sheehan*, 135 S. Ct. at 1776 ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures.").

Not once in their discussion of clearly established law do Respondents acknowledge Leija's explicit threat to shoot police. *See* Br. in Opp. 22–23. And they fail to cite a single case in which a fleeing suspect expressly threatened to shoot police.[3] That is enough to prove that Officer Mullenix did not violate clearly established law.

III. THIS IS AN IDEAL VEHICLE.

Respondents identify no vehicle problems preventing this Court from resolving either question presented.

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[3] The only cited case that involves a threat to shoot officers provides an instructive contrast. In *O'Bert v. Vargo*, 331 F.3d 29, 33 (2d Cir. 2003), a non-fleeing suspect yelled, "I will blow your f***ing heads off," when officers threatened to enter his trailer. The officers saw through a window, however, that the suspect had "nothing in his hands but a cigarette." *Id.* The Second Circuit affirmed the denial of summary judgment because the record, with all disputed facts resolved in the plaintiff's favor, indicated that the suspect did not have a gun when the officers entered the trailer, and he remained in sight until he was shot. *See id.* at 39.

Indeed, this case is an ideal vehicle to consider the Fourth Amendment question in particular. There is no dispute that Leija made explicit threats to shoot police officers, that Officer Ducheneaux was positioned beside the road in Leija's path, or that Leija was closing in on Ducheneaux at the time Mullenix fired his weapon.

The court of appeals did not, as Respondents allege, "conclude that there were triable issues of fact precluding summary judgment." Br. in Opp. i. On the contrary, it held that the facts, viewed in Respondents' favor, "establish that Mullenix's use of force at the time of the shooting was objectively unreasonable under the Fourth Amendment." Pet. App. 21a. The summary-judgment posture therefore will not interfere with review of the Fourth Amendment question.

The legal questions are clearly framed and well-vetted. The court of appeals issued its initial published opinion over Judge King's dissent. It then denied rehearing en banc and issued a substitute opinion, with Judge Jolly and Judge King publishing dissents from the denial of en banc review.

This basic fact pattern—an attempt to stop a fleeing suspect who has expressly threatened to harm police officers—is likely to recur. This exceptionally important issue warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY,

Petitioner,

v.

BEATRICE LUNA, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.; CHRISTINA MARIE FLORES, AS NEXT FRIEND OF J.L. AND J.L., MINOR CHILDREN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The National Association of Police Organizations ("NAPO") is a coalition of police units and associations from across the United States. It was organized for the purpose of advancing the interests of America's law enforcement officers. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement in the country. NAPO represents over 1,000 police units and associations, over 241,000 sworn law enforcement officers, and more than 100,000 citizens who share a common dedication to fair and effective law enforcement. NAPO often appears as *amicus curiae* in cases of special importance.

The National Sheriffs' Association ("NSA") is a non-profit association formed under 26 U.S.C. 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,083 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected.

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

Amici have a strong interest in this case because the Fifth Circuit's opinion eliminates critical qualified-immunity protections upon which *Amici*'s members rely. Police officers, sheriffs, and other law enforcement officers all depend on the courts to protect them from the burdens of personal-liability lawsuits. If the Fifth Circuit's opinion is allowed to stand—where an officer is denied qualified immunity despite the fact that the fleeing suspect drove recklessly for more than 25 miles at speeds of 110 miles per hour, was believed to be intoxicated, and threatened to shoot police officers—law enforcement will think twice before acting assertively to end high-speed chases. This is a dangerous result for officers and the general public. *Amici* thus write to urge the Court to grant certiorari.

SUMMARY OF THE ARGUMENT

Robust qualified immunity is essential to police officers and the public they are sworn to protect. By giving officers "breathing room to make reasonable but mistaken judgments," *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), qualified immunity ensures that only those officers who "knowingly violate the law" or act in a way that is "plainly incompetent" will face the enormous burden of litigation. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013).

Amici can attest to the importance of qualified immunity. When officers are sued for actions taken in the line of duty, they suffer personally and professionally: they are unable to work because they must deal with the burdens of litigation, and the threat of personal liability from punitive damages puts enormous strain on their emotional and financial wellbeing. Worse still, the threat of personal-liability lawsuits places police officers and

innocent bystanders in danger because officers may "be induced to act with an excess of caution." *Forrester v. White*, 484 U.S. 219, 223 (1988). Nowhere is this hesitancy more problematic than in high-speed chases, through which dozens of police officers and innocent bystanders die every year. Instead of acting with caution, police officers must act assertively in high-speed chases to bring these dangerous situations to an end.

The Fifth Circuit ignored all of these concerns in denying qualified immunity to Officer Mullenix. In doing so, the court ignored undisputed facts showing the situation's dangerousness, the speed with which events were unfolding, and the culpability of the fleeing suspect, Israel Leija, Jr. In particular, the Fifth Circuit denied qualified immunity despite the fact that Leija had been driving in the dark of night for more than 18 minutes and 25 miles at speeds up to 110 miles per hour; was believed to be intoxicated; and had twice called 911 and threatened to shoot any police officer he saw. Under such circumstances, Officer Mullenix's decision to attempt to disable Leija's vehicle was eminently reasonable.

In holding otherwise, the Fifth Circuit appeared to believe that the threat Leija caused was not "sufficiently imminent" and so Officer Mullenix should have allowed the car chase to continue. In particular, the Fifth Circuit placed great weight on the potential availability of tire spikes to terminate the chase. But that reasoning is flawed. Officers have no obligation to allow dangerous high-speed chases to continue on the hope that they might be terminated through the use of non-deadly force. Yet even if such a rule existed, the fact that another officer was setting up tire spikes to slow down Leija's vehicle does not

change the analysis. Tire spikes are dangerous—to both officers and the general public—and are not a cure-all. Even when officers deploy tire spikes, fleeing suspects frequently continue to drive recklessly by either careening around them or continuing to drive on deflated tires. There was simply no justification for denying qualified immunity based on a judicial faith in such devices.

ARGUMENT

I. Qualified Immunity Is Critically Important To Police Officers And The Public They Are Sworn To Protect.

The doctrine of qualified immunity "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. Qualified immunity thus shields government officials from the heavy burdens of litigation unless their actions in the line of duty violate "clearly established" law. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). In other words, unless a government official "knowingly violate[s] the law," or acts in a way that is "plainly incompetent," he is entitled to qualified immunity and prompt dismissal. *Stanton*, 134 S. Ct. at 5.

The qualified-immunity doctrine vindicates critical public policies. As the Court has explained, personal-liability lawsuits "diver[t] official energy from pressing public issues." *Harlow*, 457 U.S. at 814. Every minute an officer is distracted in the litigation process—producing

documents, responding to discovery, preparing for depositions, attending and giving depositions, developing case strategy, and preparing for and attending trial—is one less minute the officer is performing the job he or she was hired to do: protecting the public. As the Court has thus explained, the "driving force" behind the creation of the qualified immunity doctrine was a desire to ensure that "insubstantial claims against government officials will be resolved prior to discovery" so that officers can focus on serving and protecting the public. *Pearson*, 555 U.S. at 232; *see also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (qualified immunity protects officials from the "demands customarily imposed upon those defending a long drawn out lawsuit").

Personal-liability lawsuits also deter "able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. These lawsuits impose enormous costs on officers. On a professional level, they hinder career advancement, as officers must live under the shroud of suspicion until the allegations against them are dismissed. These suits also impact officers' personal lives. While they will often be indemnified against litigation costs and judgments,[2]

2. Personal-liability suits thus impose enormous costs on state and local governments that must defend against these suits. The median cost of being a defendant in federal court is $20,000. *See* Emery G. Lee III, Fed. Judicial Ctr., *National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* at 37 (2009). When discovery is involved, the median cost triples to $60,000. *Id.* By comparison, the median annual salary of police officers is about $56,000. United States Department of Labor, Bureau of Labor and Statistics, *available at* http://www.bls.gov/oes/current/oes33051/oes333051.htm. Needless to say, governments would

many officers still face the prospect of personal liability if punitive damages are imposed. This threat of punitive damages can cause real harm. For example, an officer applying for a home or car loan would likely have to disclose the possibility of liability if he were a defendant in a lawsuit, which could prevent him from securing a loan.[3] Officers also might see their personal lives invaded through discovery, as they might be forced to disclose their personal finances because such information might be relevant when assessing punitive damages. *See, e.g., P. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Absent qualified immunity, bright, capable people—precisely the men and women who should be put in a uniform—will refrain from donning the badge. This will leave communities with only the "most resolute or the most irresponsible." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998). That clearly would not be in the public interest.

Finally, the threat of personal-liability lawsuits can cause police officers to hesitate and act tentatively. The threat of liability may induce government officials "to act with an excess of caution or otherwise to skew their

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be better served by using their limited funds to hire more police officers rather than defend against these lawsuits.

3. For example, prospective borrowers must disclose all pending litigation on Fannie Mae's Uniform Residential Loan Application. *See* Uniform Residential Loan Application, at https://www.fanniemae.com/ content/guide_form/1003irev.pdf, at 3, § VIII(d) (last visited Apr. 16, 2014). Certainly if there is a risk of personal liability that would not be covered by a state's, county's, or municipality's indemnification procedure (i.e., punitive damages), then the official's attractiveness as a borrower diminishes considerably.

decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester*, 484 U.S. at 223. Ultimately, exposing government officials to the same legal standards as ordinary citizens "may detract from the rule of law instead of contributing to it." *Id.*

An officer's reticence can endanger both the public and police officers themselves. Undoubtedly, everyone is safer when officers act swiftly and exercise discretion in combatting crime and protecting the public. As one FBI official has explained:

> Law enforcement effectiveness often depends on officers' confidence and willingness to act swiftly and decisively to combat crime and protect the public. However, the fear of personal liability can seriously erode this necessary confidence and willingness to act. Even worse, law enforcement officers ... may become overly timid or indecisive and fail to arrest or search—to the detriment of the public's interest in effective and aggressive law enforcement.

Daniel L. Schofield, *Personal Liability: The Qualified Immunity Defense*, FBI Law Enforcement Bulletin, Mar. 1990, *available at* https://www.ncjrs.gov/pdffiles1/Digitization/123809NCJRS.pdf.

Nowhere is this assertiveness needed more than in high-speed police chases. Such chases are extraordinarily dangerous to the public. And, law enforcement officers often are the only line of defense against criminals who terrorize the highways through frightening, reckless,

and menacing driving. It is the duty of law enforcement to face these dangers head on and protect the public from further harm.

When police fail to end a high-speed chase quickly, the results are often deadly, as evidenced by the hundreds of people who die every year in the United States as a result of high-speed chases. *See* H. Range Hutson et al., *A Review of Police Pursuit Fatalities in the United States from 1982-2004*, Prehospital Emergency Care, Jul.-Sept. 2007, at 278. Between 1982 and 2004, there were 7,430 fatalities as a result of high-speed chases. Of these, 2,075 individuals were not in the reckless car leading the chase, but rather were police officers, occupants of another vehicle, or individuals outside of the vehicles. *Id.* In other words, every year dozens of police officers and innocent bystanders die as a result of fleeing suspects. *Id.*; *see also* Patrick T. O'Connor & William L. Norse, *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 Mercer L. Rev. 511, 511-12 (2006) (noting that in 2003 of the 350 people who died as a result of high-speed chases more than a hundred were innocent bystanders).

Indeed, state-court decisions in which high-speed chases killed innocent bystanders or police officers are sadly too numerous to fully catalog here. *See, e.g.*, *People v. Prindle*, 944 N.E.2d 1130, 1131-32 (N.Y. 2011) (second degree manslaughter conviction for killing innocent bystander after fleeing from police); *People v. Moore*, 114 Cal. Rptr. 3d 540, 542 (Cal. Ct. App. 2010) (second degree murder conviction for leading police on high speed chase that caused an accident killing innocent bystander); *McKinley v. State*, 945 A.2d 1158, 1159-61 (Del. 2008)

(second degree murder conviction for striking and killing innocent motorist while leading police on a high speed chase); *O'Neal v. State*, 236 S.W.3d 91, 99-100 (Mo. Ct. App. 2007) (second-degree felony murder conviction for leading police on chase in which two bystanders were killed when the officer's car collided with their vehicle); *Michelson v. State*, 805 So.2d 983, 984-87 (Fla. Dist. Ct. App. 2001) (third degree felony murder conviction for killing innocent motorist while fleeing from police at high speeds); *State v. Pantusco*, 750 A.2d 107, 109 (N.J. Super. Ct. App. Div. 2000) (felony murder conviction for causing death of innocent motorist while fleeing from police); *State v. Lovelace*, 738 N.E.2d 418, 420-21 (Ohio 1999) (involuntary manslaughter conviction for leading police on chase in which officer struck and killed third party) *State v. Chambers*, 589 N.W.2d 466, 470 (Minn. 1999) (first degree murder conviction for killing police officer by striking police roadblock at the end of high speed chase); *Lester v. State*, 737 So.2d 1149, 1150-52 (Fla. Dist. Ct. App. 1999) (vehicular homicide conviction for striking and killing innocent bystander while fleeing from police); *Meeks v. State*, 455 S.E.2d 350, 351-53 (Ga. Gt. App. 1995) (vehicular homicide convictions for striking and killing police officer while leading other officers on high speed chase).

In all of these cases, fleeing suspects become killers, and their vehicles become murder weapons. The Fourth Amendment does not require an officer to "simply cease[] [his] pursuit" of a reckless motorist and "hope[] for the best." *Scott*, 550 U.S. at 385. A fleeing suspect will not simply slow down and no longer drive recklessly once the police have ceased their pursuit. *Id.* Instead, the suspect will likely continue to drive recklessly in an attempt to get

as far away as possible. *Id.* Thus, a rule requiring police not to pursue fleeing criminals would create perverse incentives, as suspects would be encouraged to flee as dangerously as possible so that pursuit would cease. *Id.* at 385-86. No police force would condone such a rule, and the Fourth Amendment does not require it.

Faced with these situations—fleeing suspects who are putting countless innocent lives in danger—it is imperative that police officers remain free to use their best judgment to resolve the situation. Police officers ordinarily do not have the time to "err on the side of caution." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991); *see also Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) ("[A]voiding unwarranted timidity on the part of those engaged in the public's business ... [e]nsur[es] that those who serve government do so with the decisiveness and the judgment required by the public good"). They must act swiftly and decisively with the confidence that they have "breathing room to make reasonable but mistaken judgments" without facing unwarranted litigation. *Pearson*, 555 U.S. at 231.

In sum, qualified immunity serves essential public policies. When courts erode this protection by deflecting the qualified immunity question to a jury under a belief that reasonable minds could reach differing conclusions to the objective reasonableness of a seizure—as the Fifth Circuit did here—these critical safeguards become weakened. This Court regularly stands guard against such encroachments. *See, e.g., Carroll v. Carman*, 135 S. Ct. 348, 352 (2014); *Lane v. Franks*, 143 S. Ct. 2369, 2381 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-23; *Wood v. Moss*, 134 S. Ct. 2056, 2070; *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013); *Reichle v. Howards*, 132 S. Ct. 2088,

2093 (2012); *Ryburn v. Huff*, 132 S. Ct. 987, 990 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084-85 (2011). It should do so here.

II. The Fifth Circuit's Decision Blatantly Disregards This Court's Qualified-Immunity Precedent.

Qualified immunity shields government officials from money damages unless a plaintiff can make two showings. First, the plaintiff must plead facts showing that "the official violated a statutory or constitutional right." *al-Kidd*, 131 S. Ct. at 2080 (quoting *Harlow*, 457 U.S. at 818). Second, the plaintiff must plead facts showing "the right was 'clearly established' at the time of the challenged conduct." *Id.* (quoting *Harlow*, 457 U.S. at 818). Respondent can make neither showing.

Under the first prong, the officer does not violate the Fourth Amendment unless his actions are objectively unreasonable. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987). In making this determination, the Court "allow[s] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Plumhoff*, 134 S. Ct. at 2020. The officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*; *see also Saucier v. Katz*, 533 U.S. 194, 207 (2001) (allowing courts to consider only the facts known to the officer "when the conduct occurred").

Here, while reasonable people can debate whether Officer Mullenix made the *right* decision, there is no question that his actions were *reasonable*. Nothing else

matters. When Officer Mullenix reached the overpass over I-27 and got into position to intercept Leija, it is undisputed that he knew the following:

- About 20 minutes earlier in Tulia, Texas, a police officer had attempted to serve an arrest warrant on Leija and Leija had fled the scene. Fifth Circuit Record on Appeal ("ROA") 571-572, 867, 869.

- For more than 26 miles, Leija had led police on a high-speed chase up I-27 at speeds ranging from 85 to 110 mph. ROA 571-572, 867, 869.

- Multiple officers were trying to catch Leija. In addition to Mullenix, Officer Rodriguez was the lead officer chasing Leija; Officer Troy Ducheneaux was setting up tire spikes underneath the overpass where Mullenix was positioned; and other officers prepared to set up tire spikes at two locations farther north on I-27. ROA 572, 574, 871.

- Leija twice called 911 and threatened harm to police officers. On the first call, Leija threatened to kill the officer following him. On the second call, Leija threatened to kill any officer he saw. *See* ROA 869 (dashcam stating Leija "will shoot any officer he sees"); *see also id.* at 566-570; *id.* at 572; *id.* at 871, Recording No. 4; *id.* at 871, Recording No. 9 (stating "he advised he is armed and will use it").

- Leija might have been intoxicated. *See* ROA 871, Recording No. 23 (stating that the "subject may be intoxicated"); *see also id.* 572, 569-570.

- As Leija approached, Mullenix believed he had two options: shoot Leija's car in an attempt to disable his engine block and end the high-speed chase, or do nothing and hope that Leija was stopped in another manner (e.g., through tire spikes or other police maneuvers). ROA 573-575.

- Mullenix knew that doing nothing might cause harm to police officers, as officers are regularly injured in the process of laying tire spikes. He knew one of his trainers had been shot standing on the side of the road waiting on a high-speed pursuit. He also knew that officers must exit their vehicle to set out spikes. And he knew Officer Ducheneaux was under the bridge with his lights flashing and would be an easy target for Leija. ROA 572-574.[4]

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4. The radio dispatch recorded a conversation between Officer Ducheneaux and Officer Mullenix:

> Officer Ducheneaux: "Chad do you know a 24 yet?"
>
> Officer Mullenix: "He just advised at Randall County line still north bound at 110. Subject in vehicle is calling and says will shoot any officer he sees, so be careful with the spikes."
>
> Officer Ducheneaux: "10-4, will try to set up spikes at Cemetery Road and 217 as well."
>
> Officer Mullenix: "10-4. I may go on bridge at Cemetery road with rifle and see what kind of shot I can get.'
>
> Officer Ducheneaux: "10-4."

ROA 871, Recording No. 8.

- Mullenix also knew that if he did nothing, innocent bystanders would continue to be in danger, because even if Leija's vehicle ran over the tire spikes, Leija could continue to drive at high speeds, allowing him not only to shoot Officer Ducheneaux, but also other officers north of the overpass. ROA 574.

- Mullenix had to act quickly, as Leija's vehicle was rapidly approaching his position. ROA 757, 869.[5]

Mullenix chose to act. By engaging Leija's vehicle, Mullenix stopped the high-speed chase and prevented innocent lives (including bystanders and police officers) from being lost. Mullenix's actions were no different from those of the officers in *Scott* and *Plumhoff*. Indeed, the car chase here was arguably *more* dangerous. Compared to the driver in *Plumhoff*, Leija drove faster (110 mph versus 100 mph), drove for almost four times as long (about eighteen minutes versus five minutes), and never came to a stop (the driver in *Plumhoff* "came temporarily to a near standstill"). *See Plumhoff*, 134 S. Ct. at 2021; *see also Scott*, 550 U.S. at 374 (noting that the suspect drove at speeds over 85 miles per hour for six minutes and nearly ten miles). If the officers in these cases acted reasonably, so too did Officer Mullenix.

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5. According to Officer Mullenix's dashcam, the entire event—Officer Mullenix arriving on the scene, talking to Trooper Rodriguez, exiting his vehicle, retrieving his rifle, running into position, and firing his weapon—occurred in less than three minutes. *See* ROA 869 (showing Officer Mullenix arriving at the bridge at minute 9:04 and firing his weapon at minute 11:46).

In holding otherwise, the Fifth Circuit made two principal findings: (1) the high-speed chase "occurred in rural areas, without businesses or residences near the interstate" and Leija "did not run any vehicles off the road," Pet. App. 26a-27a, and (2) officers were setting up tire spikes behind Officer Mullenix and so there might have been other opportunities to subdue Leija, *id.* 27a-28a. Neither rationale is persuasive.

First, the Fifth Circuit's opinion amounts to a rule that police officers must allow a high-speed chase to continue as long as it is occurring in a rural area and the getaway driver is skilled at avoiding accidents. But "[i]t is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he" flees the police outside of city limits and he believes he can handle his car deftly. *Scott*, 550 U.S. at 385. "The Constitution assuredly does not impose this invitation[.]" *Id.* at 385-86. Officer Mullenix was under no obligation to "take[] that chance and hope[] for the best." *Id.* at 385.

Second, the Fifth Circuit's opinion is based on the incorrect belief that tire spikes are a foolproof method for ending high-speed chases without casualties. Officers themselves are the people most endangered by tire spikes. As the FBI has explained, deploying tire spikes can be "a real danger for law enforcement officers." Gregory McMahon, *Deployment of Spike Strips*, FBI Law Enforcement Bulletin, Sept. 2012, *available at* http://leb.fbi.gov/2012/september/bulletin-alert-deployment-of-spike-strips. "The use of spike strips began in 1996. Since that time, drivers have struck and killed 26 law enforcement officers, five in 2011—the most since 2003,

which also featured five officer deaths. In at least one of the 2011 deaths, an offender intentionally struck an officer." *Id.*; *see, e.g.*, *Jefferson v. State*, 276 S.W.3d 214 (Ark. 2008) (describing how an officer was killed while placing tire spikes in the street). Indeed, some jurisdictions in Texas prohibit the use of tire spikes altogether for this very reason. *See* Tanya Eiserer, *Dallas Police Ban Use of Spike Strips That Can Halt Fleeing Vehicles*, Dallas Morning News, June 7, 2012 ("Dallas police are banning spike strips out of concern that an officer may be hurt or killed while trying to use the devices. There's an increasing awareness that such tire-deflation devices, once thought to be a useful tool, can be dangerous[.]").

Moreover, even if officers are not injured in the process, tire spikes do not always succeed in ending the high-speed chase. Fleeing suspects often avoid tire spikes by driving dangerously around them. *See, e.g.*, *State v. Jones*, 103 So.3d 420, 421 (La. Ct. App. 2012) (the fleeing suspect avoided tire spikes by driving onto curbs and medians); *Young v. State*, 86 So. 261, 263-64 (Miss. Ct. App. 2011) (the fleeing suspect was able to drive around tire spikes "on multiple occasions"). Fleeing suspects also can continue to drive (and do so dangerously) even when they have run over the tire spikes. *See, e.g. State v. Moyers*, 266 S.W.3d 272, 277 (Mo. Ct. App. 2008) (after driving over tire spikes, the suspect continued an hour long flight going 90 mph on deflated tires); *State v. Johnson*, 220 S.W.3d 377, 379 (Mo. Ct. App. 2007) (the defendant continued to drive after running over two sets of tire spikes); *Athay v. Stacey*, 128 P.3d 897, 900 (Idaho 2005) (the suspect immediately accelerated to 96 mph after driving over spikes and eventually collided with another vehicle while traveling 104 mph). Given these realities, the Fifth Circuit's decision

to place so much reliance on the potential availability of tire spikes was deeply flawed.

Regardless, the potential availability of tire spikes did not constitutionally *require* Officer Mullenix to refrain from using deadly force *until* tire spikes were first deployed. There is no "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382. All that matters, for purposes of qualified immunity, is whether his actions were "reasonable." *Id.* at 382-83. There can be no doubt that they were.

Finally, even if these two factors have some relevance, which they do not, the Fifth Circuit's opinion improperly elevated them over far more probative facts for the qualified-immunity analysis. For example, the court should have focused on the speed of the driver (85-110 mph), the duration of the chase (more than 25 miles over 18 minutes), and the time of the chase (after dark, around 10:30 pm). Even worse, the Fifth Circuit ignored the critical factor at issue: Leija's culpability. In deciding whether Mullenix's actions were reasonable, the Fifth Circuit was required to "consider the risk of bodily harm that [Mullenix's] actions posed to [Leija] in light of the threat to the public that [Mullenix] was trying to eliminate." *Scott*, 550 U.S. at 383. "It was [Leija], after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [Mullenix] confronted." *Id.* at 384. By contrast, "those who might have been harmed had [Mullenix] not taken the action he did were entirely innocent." *Id.* With Mullenix facing a fleeing, possibly intoxicated criminal who was driving recklessly after

dark and threatening to kill police officers at first sight, there should have been "little difficulty in concluding it was reasonable for [Mullenix] to take the action that he did." *Id.* By focusing on protecting Leija's life above all others, the Fifth Circuit ignored the fact that it was *Leija*—not the officers—who put everyone in this dangerous situation.

Even if Respondent satisfies the first prong of the qualified immunity analysis, however, she still fails at the second prong of the test because it was not "clearly established" at the time of Mullenix's conduct that his actions were unconstitutional. Pet. Br. 21-29. A police officer's conduct violates clearly established law "when, at the time of the challenged conduct, the contours of a right are sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right." *al-Kidd*, 131 S. Ct. at 2083 (emphasis added). This is a demanding standard: "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* Thus, the standard is not whether clearly established law *supported* the officer's use of force; it is whether an officer's conduct was *prohibited* by clearly established law. *See* Pet. Br. 26.

Here, not only was there no precedent prohibiting Mullenix's actions, but the opposite was true: there was clearly established law *endorsing* Officer Mullenix's conduct. The Court in *Scott* could not have been clearer when it "la[id] down a ... sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott*, 550 U.S. at 386. That should have been the end of the

matter. Indeed, the fact that almost half of the judges on the Fifth Circuit believed Mullenix acted reasonably should be conclusive that there was no clearly-established law prohibiting his conduct. *See al-Kidd*, 131 S. Ct. at 2086 (noting that the official was entitled to qualified immunity "not least because eight Court of Appeals judges agreed with his judgment in a case of first impression"); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). For this additional reason, Officer Mullenix should have received qualified immunity for this reason too.

Critical to the Fifth Circuit's refusal to grant immunity to Mullenix was its belief that, because of the summary judgment standard, a reasonable juror could find that the "risk" Leija posed to the public was not "sufficiently imminent" to warrant use of deadly force. Pet. App. 18a. In essence, the Fifth Circuit followed the same path that Justice Stevens laid in *Scott*: "Whether a person's actions ha[d] risen to a level warranting deadly force is a question of fact best reserved for a jury." *Scott*, 550 U.S. at 395 (Stevens, J., dissenting). But as the Court made clear, objective reasonableness is not a question of *fact*; it is a "pure question of law." *Id.* at 381 n.8; *accord Plumhoff*, 134 S. Ct. at 2019 (whether officers' seizure was objectively reasonable is a "legal issue[]."

To be sure, summary judgment requires both that there be "no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). But in the context of qualified immunity in an excessive force case, if reasonable minds can differ over

the objective reasonableness of an officer's seizure, that officer is "entitled to judgment as a matter of law," *id.*, because that is the precise moment immunity attaches: when "officers of reasonable competence could disagree on th[e] [legal] issue." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). By deferring the question to the jury because reasonable minds might disagree over the propriety of Officer Mullenix's actions, the Fifth Circuit improperly "place[d] the question of immunity in the hands of the jury." *Hunter*, 502 U.S. at 228. Because this Court's precedent demands otherwise, the Court should correct the Fifth Circuit's judgment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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CHADRIN LEE MULLENIX,
in His Individual Capacity,

Petitioner,

v.

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION AND TEXAS ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Texas Municipal League ("TML") is a non-profit association of over 1,000 Texas municipalities. Over 13,000 mayors, council members, city managers, city attorneys, police chiefs, and other department heads are member officials of the League by virtue of their cities' participation. The TML legal defense program was established to monitor major litigation which affects municipalities and to file briefs on behalf of cities in cases of special significance to municipalities.

The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of attorneys who represent Texas cities and city officials in the performance of their duties.

The Texas Association of Counties is a non-profit corporation created pursuant to Section 89.002 of the Texas Local Government Code. Each of the 254 Texas counties is a member of the Association. The Association's Board of Directors includes representatives

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The entity funding preparation of this brief is the Texas Municipal League Intergovernmental Risk Pool. Amici understand that Petitioner and Respondents have both consented to the filing of amicus briefs in this appeal and received notice, at least ten days prior to the due date of this brief, of amici's intention to file.

from the County Judges and Commissioners Association of Texas, the North and East Texas Judges and Commissioners Association, the South Texas Judges and Commissioners Association, the West Texas Judges and Commissioners Association, the Texas District and County Attorneys Association, the Sheriff's Association of Texas, the County and District Clerks Association of Texas, the Texas Association of Tax Assessors-Collectors, the County Treasurers Association, the Justice of the Peace and Constables Association of Texas, and the County Auditors Association of Texas.

INTRODUCTION

Amici strongly urge the Court to grant Mullenix's petition. The court of appeals' decision represents a significant departure from the way this Court has articulated and applied qualified immunity principles. The opinion goes so far as to effectively adopt an exhaustion of "alternative" or "non-lethal" methods requirement before an officer may resort to deadly force. Pet. App. 16a, 21a. No court has embraced such a rule and this Court has expressly or implicitly eschewed it.

As this Court has often explained, courts must view the immediacy and severity of the risk posed by a fleeing felon or other dangerous individual from the perspective of, and with great deference to, those charged with protecting against the risks created by

those individuals. A suspect's overt threats to shoot and kill officers during a high-speed pursuit represent one of the most grave risks law enforcement officials can face. The present outcome does not hold true to precedent and profoundly impacts thousands who, like the Petitioner, put their lives on the line daily.

Amici are a part of the law enforcement community to whom this Court and the Courts of Appeals speak when promulgating "clearly established" law for qualified immunity purposes. Amici share that community's concern that the challenged decision breaks from traditional immunity moorings when deciding whether the law has reached a point of being enunciated clearly enough that an officer would have known his or her conduct violated clearly established law. This Court's precedent, as the Fifth Circuit's, did not provide the requisite clear notice to Mullenix that his conduct would have been, as the court of appeals held, objectively unreasonable. Pet. App. 12a, 24a. These and other holdings by the court necessitate review to ensure qualified immunity remains the meaningful doctrine it is intended to be and to ensure the protections law enforcement officers are dedicated to provide.

ARGUMENT

I. The court of appeals' reasonableness analysis conflicts with this Court's precedent.

The court of appeals held that Mullenix's conduct was objectively unreasonable and therefore violated Leija's Fourth Amendment rights because, it said, Leija did not pose a substantial and immediate risk to officers or others at the second Mullenix fired his weapon. Of the stated reasons driving its conclusion, two stand out. First, because traffic was "light" in the court's view, the risk Leija posed to others was minimal and materially different from the risks in *Scott v. Harris*, 127 S.Ct. 1769 (2007); *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014); and *Thompson v. Mercer*, 762 F.3d 433 (5th Cir. 2014). Second, Mullenix did not allow for what the court called "alternative" or "non-lethal" methods, *i.e.*, road spikes, to potentially stop Leija's speeding car before firing at his engine.

In light of the facts construed in Respondents' favor, the relevant legal question leads to one inescapable conclusion: Mullenix's actions were objectively reasonable. The court of appeals' justifications for concluding otherwise offend long-engrained qualified immunity principles and exemplify precisely the type of "20/20 hindsight" determination qualified immunity law proscribes. *Plumhoff*, 134 S.Ct. at 2020; *Graham v. Connor*, 490 U.S. 386, 396 (1989). The required analytical framework is built on the "perspective of a reasonable officer on the scene" and the facts known to (or reasonably believed by) that officer.

Plumhoff, 134 S.Ct. at 2020. *See Ryburn v. Huff*, 132 S.Ct. 987, 991 (2012).

Accordingly, the most critical, and *undisputed*, facts informing the present analysis are Leija's repeated threats that he had a gun and ***he would shoot any officer*** he saw. As with a bomb threat, officers have a right – indeed an obligation – to believe, and therefore assume, Leija had a gun and that he intended to use it, going so far beyond rational bounds as to be willing to shoot *any* police officer. Also, the dispatcher informed the responding officers that Leija was potentially intoxicated and unstable. Given those circumstances, which were communicated to Mullenix, "[t]he Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm." *Elliott v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1996). Thus, police officers do not have "to wait until a suspect shoots to confirm that a serious threat of harm exists." *Id.* at 643. This strong presumption renders immaterial whether Leija in fact had a gun or whether officers could see it, facts the court of appeals emphasized but which could not have been known to any officer until Leija was no longer a threat. Pet. App. 3a, 19a. Therefore, the court's citation to this fact, established only after Mullenix was required to decide what to do to protect himself and others, is unrelated to the issue of whether Mullenix's actions violated the Fourth Amendment.

To be sure, "*Scott* did not declare open season on suspects fleeing in motor vehicles." *Thompson*, 762

F.3d at 438. But the court must recognize that a known promise to kill police officers – itself a felony, which Leija committed twice while eluding pursuit – is among the most grave threats law enforcement officers can face. The greater the threat, the greater the justification for deadly force to neutralize that threat. The court of appeals affords far too little weight to the clear gravity of Leija's explicitly and repeatedly stated intent to inflict deadly harm on the peace officers he was both evading and approaching. Given those threats, together with Leija's conduct throughout the chase, it is objectively reasonable for an officer to believe that Leija was an ongoing and continuous threat to the lives and safety of others.

The Sixth Circuit has emphasized analogous threats to law enforcement officers in establishing the objective reasonableness of deadly force. *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (use of deadly force not unreasonable when suspect "posed a major threat" to officers manning roadblock by driving directly into them on a residential dead-end street and "had proven he would do almost anything to avoid capture").[2] The present outcome cannot be squared with *Smith*.

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[2] Additionally, in *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992), the court found that exigent circumstances existed as a matter of law when police received a call concerning a suicidal and possibly homicidal gunman, and at least one radio communication indicated the gunman had threatened to kill any police officers who arrived. *Id.* at 1375 (context of warrantless searches

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Further, the court of appeals' reference to so-called "light traffic" does not support its holding. When an evading felon has threatened the lives of officers, or even in a more general sense, the absence of heavy traffic on the interstate does not affect, let alone minimize, the severity or immediacy of the risk Leija posed. High-speed pursuits are inherently dangerous. *County of Sacramento v. Lewis*, 118 S.Ct. 1708 (1998) (high-speed automobile chase is a rapidly evolving, fluid, and dangerous predicament). For so many good reasons, this Court and other courts have rejected the "lonely" roads argument as dissipating the ongoing and serious threat posed by felons evading lawful pursuit at high speeds. *Scott*, 127 S.Ct. at 1775; *Thompson*, 762 F.3d at 439 (acknowledging the immediacy of the danger to vehicles up road if suspect had been allowed to continue driving spree). This Court has not suggested the level of traffic bears at all on an officer's assessment of the risk associated with a fleeing felon who has repeatedly threatened to kill police officers if stopped.

In fact, the light traffic could be much more easily seen as a justification for Mullenix to act as *and when* he did, to minimize the exposure to innocents if he was successful in disabling Leija's vehicle, as he attempted. Instances of lighter traffic present *less* risk of an officer injuring innocent bystanders or

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under exigent circumstances). The court thus found a suspect's threat to shoot officers to be of sufficient immediacy and urgency to establish exigent circumstances as a matter of law.

others, making the choice to use deadly force in ending the threat at that moment *more* reasonable, not less. Counterintuitively, and perhaps inadvertently, the court of appeals' reliance on this issue could be read to suggest it may be preferable that officers shoot into a crowd. While this analysis seems to be the very "sanctity of the judge's chambers"[3] review this Court has shunned, its result, and certainly the precedent it has the potential to establish, is not and cannot be the law.

Mullenix knew Leija was minutes from reaching the overpass where Ducheneaux was deploying spike strips. Regardless of whether Mullenix could see Ducheneaux's precise location, he knew Ducheneaux was there and any officer in Mullenix's position would reasonably believe Ducheneaux would be a target for Leija to make good on his several threats to cause death or serious bodily injury to "*any* police officer." This rational concern is heightened when a speeding suspect slows down as he approaches the officers threatened, which would only facilitate Leija's ability to effectively fire on the officers or use his vehicle itself as a weapon. Thus, Leija's slowing his car as he approached does not support the court's conclusion.

The video of the present high-speed chase reveals a scenario just as, if not more, dangerous than the risks presented in *Plumhoff*, a recent case in which

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[3] *Graham*, 490 U.S. at 396.

this Court found the use of deadly force objectively reasonable. The pursuit of Leija was longer in duration and distance than the approximately five minute chase in *Plumhoff*. Leija recklessly weaved and swerved around other vehicles at night on a dark highway for over 18 miles, reaching speeds of up to 110 miles per hour, giving no indication that he intended to give up. During the chase, he twice called the dispatcher to say he had a gun and would shoot any officers he saw, thus expressing an unmistakable intention to cause immediate serious injury or death to police officers. Fast approaching several officers, including those deploying road spikes, Leija was in a position to make good on his threats. Mullenix also had reason to believe Leija might be intoxicated.

Equally if not more troubling is the court of appeals' heavy emphasis on Mullenix's decision to fire at Leija's engine before he actually drove over the road spikes. Contrary to Supreme Court precedent, the Fifth Circuit is now creating a rule that "alternative" methods[4] must be exhausted before resorting to deadly force when the fleeing suspect has already

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[4] The court of appeals' substitute opinion, issued December 19, 2014, modified its prior opinion by inserting the phrase "alternative methods" in place of "non-lethal methods," which the court used in its original opinion. *Compare* Pet. App. 16a, 21a *with* 765 F.3d at 540, 542.

threatened to shoot any officers he sees.[5] This Court has never articulated such a principle. Moreover, in reaching its conclusion, the Fifth Circuit even disregarded its own binding precedent. *Ramirez v. Knoulton*, 542 F.3d 124, 129-130 (5th Cir. 2008) (rejecting officer's failure to consider non-lethal methods as a compelling basis to deny immunity in deadly force case). The instant result was no accident; it represents a complete distortion of Fourth Amendment law, a point not lost on Judge Jolly and the other Judges who dissented from en banc rehearing. Pet. App. 40a-41a.[6]

More so, if the case at bar were offered for the proposition the court of appeals clearly implies, it conflicts with existing authority in other circuits. "There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used." *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994). On the contrary, "where deadly force is otherwise justified

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[5] Leija was "fleeing" only those officers behind him. He was rapidly approaching officers he twice threatened to shoot, including Mullenix and Ducheneaux.

[6] As Judge Jolly stated: "[m]y impression is that the panel majority either does not understand the concept of qualified immunity or, in defiance thereof, impulsively determines the 'right outcome' and constructs an opinion to support its subjective judgments, which necessarily must ignore the concept and precedents of qualified immunity." *Id.*

under the Constitution, there is no constitutional duty to use non-deadly alternatives first." *Id.*

A prophylactic standard requiring exhaustion of "non-lethal" or "alternative" methods before resorting to deadly force in Fourth Amendment cases is flatly unworkable. This is particularly so when fleeing suspects overtly threaten officers' lives and certain forms of non-lethal mechanisms, such as spike strips, would provide those felons precisely the opportunity to carry out their threats. As Judge King noted, as precedent demonstrates, and as the record proves, road spikes are inherently dangerous to the officers who deploy them and they often fail. *Luna v. Mullenix*, 765 F.3d 531, 548-49 (5th Cir. 2014) (withdrawn on rehearing) (King, J., dissenting); *Thompson*, 762 F.3d at 440; ROA.636-ROA.637 [describing frequent ineffectiveness of spikes and dangers to officers attempting to deploy them]. Of course, in the instant case, the risk of the use of spikes is only in addition to the risk of Leija's clear threats.

Amici curiae believe the reasonableness of Mullenix's actions is as objectively clear as the officers' actions in *Scott*, *Brosseau*,[7] *Plumhoff*, and *Thompson*. Because the Fifth Circuit's opinion in the present case holds otherwise, the Court should grant review and reverse it.

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[7] *Brosseau v. Haugen*, 125 S.Ct. 596, 599 (2004).

II. The decision irreconcilably conflicts with controlling precedent as to the "clearly established law" element and substantially erodes qualified immunity as a viable defense.

Given the explicit disagreement among the panel judges as to whether Mullenix's actions violated the Fourth Amendment, informed readers would recognize this case to at least fall within the "hazy border between excessive and acceptable force" deserving of qualified immunity protection. *Saucier v. Katz*, 121 S.Ct. 2151, 2158 (2001). Yet the court of appeals did not so hold and refused Mullenix the benefit of reasonably mistaken beliefs.

Without question, denying qualified immunity requires the court to identify a "particular right" so clearly established that the official had fair notice of that right and its concomitant legal obligations. *Camreta v. Greene*, 131 S.Ct. 2020, 2031 (2011). The interests immunity preserves are so great that this Court insists the right, and its particular contours, be articulated "in light of the specific context of the case." *Saucier*, 121 S.Ct. at 2156. Only when "controlling authority" or a "robust consensus of persuasive authority" leaves no doubt that the officer's conduct violated the Constitution may a court refuse immunity. *Plumhoff*, 134 S.Ct. at 2023. Existing precedent must place the constitutional question "beyond debate." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011). When the lawfulness of an officer's conduct is "arguable" under existing law, immunity applies. *Reichle v. Howards*, 132 S.Ct. 2088, 2096 (2012).

"This inquiry focuses not on the general standard – when may an officer use deadly force against a suspect? – but on the *specific circumstances of the incident* – could an officer have reasonably interpreted the law to conclude that the perceived threat posed by the suspect was sufficient to justify deadly force?" *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 383, n.1 (5th Cir. 2009) (emphasis added) (citing *Brosseau*, 125 S.Ct. at 599). As this Court observed, "[t]his is the nature of a test which must accommodate limitless factual circumstances." *Saucier*, 121 S.Ct. at 2158.

Whether a reasonable officer would have known that his or her use of deadly force violated a particularized constitutional right depends on how the court defines the right. Here, the problem begins with the court of appeals' characterization of the right at issue in such general terms that one questions qualified immunity's continued vitality. Faced with the present *undisputed* facts, the court of appeals defined the "clearly established" right as prohibiting "deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." Pet. App. 22a. An unsurprising proposition, but certainly one failing to appreciate the "specific circumstances of the incident." *Ontiveros*, 564 F.3d at 383, n.1. Future courts and litigants could now cite the Fifth Circuit's opinion to deny qualified immunity in practically any instance when fleeing suspects overtly threaten officers' lives. It is undisputed Leija repeatedly threatened that he had a gun and would fire upon any officers he saw. An express and deliberate threat to kill peace

officers is simply too alarming and important a factual circumstance to justify ignoring it in articulating the specific context of the right at issue. The majority's characterization of the right "avoids the crucial question whether the official acted reasonably in the particular circumstances" faced. *Plumhoff*, 134 S.Ct. at 2023.

Most important to the court's qualified immunity analysis is the indisputable fact that there is no Supreme Court (or Fifth Circuit) case that, as of March 2010, fairly and "beyond debate" notified Mullenix that his decision to fire upon Leija's vehicle in these circumstances was objectively unreasonable under the Fourth Amendment. Saying blandly that the Constitution prohibits deadly force against a fleeing felon absent "sufficient threat of harm to the officer or others" hardly accounts for the multitude of circumstances from which an officer could reasonably believe a sufficient risk exists and certainly does not perform the particularized evaluation mandated by well-established Supreme Court and circuit precedent. In 2010, reasonable officers certainly could have read *Scott* and *Brosseau* as endorsing, not condemning, a decision to fire at Leija's speeding car as it quickly approached an officer exposed to the roadway as he was deploying spike strips and presented further danger to other officers just north of Mullenix's position. The broad, general approach applied in the case at bar simply cannot be squared with existing precedent emphasizing the "highly fact-specific" nature of excessive force cases and expressing the

desirability, if not the necessity, of "cases squarely on point" before refusing officers their presumptive qualified immunity. *Cf. Ontiveros*, 564 F.3d at 383, n.1 (citing *Brosseau*, 125 S.Ct. 596; *Anderson v. Creighton*, 107 S.Ct. 3034, 3038-39 (1987)).

Lacking controlling precedent governing these particular circumstances, the Fifth Circuit turned to the Sixth and Eleventh Circuits to support its broadly generalized description of the constitutional right at issue. Pet. App. 22a-23a (citing *Kirby v. Duva*, 530 F.3d 475, 484 (6th Cir. 2008), and *Vaughn v. Cox*, 343 F.3d 1323, 1330 (11th Cir. 2003)). Some Circuits, including notably the Fifth Circuit, do not permit reference to other circuits in determining whether the contours of particular constitutional rights are "clearly established." *Brady v. Fort Bend Cty.*, 58 F.3d 173, 175 (5th Cir. 1995); *Boddie v. City of Columbus, Miss.*, 989 F.2d 745, 748 (5th Cir. 1993). The Seventh Circuit, on the other hand, disagrees with the Fifth Circuit on the relevance of inter-circuit law in establishing a right as "clearly established." *Burgess v. Lowery*, 201 F.3d 942, 944 (7th Cir. 2000). Thus, the propriety of expanding the analysis to decisions beyond those of the Supreme Court and forum circuits is a question that in itself warrants review.

The court of appeals also cited unpublished Fifth Circuit cases as providing the requisite notice to law enforcement officers. Pet. App. 22a-23a (citing *Sanchez v. Fraley*, 376 Fed. App'x 449, at *4, n.1 (5th Cir. 2010); *Reyes v. Bridgewater*, 362 Fed. App'x 403, 404-05 (5th Cir. 2010)). However, such decisions are

entitled to little if any weight insofar as educating the law enforcement community is concerned because unpublished decisions, though permissible to cite, are not precedent. FED. R. APP. P. 32.1; 5th Cir. Loc. R. 47.5.4. Accordingly, they cannot be used to inform police officers on the clearly established law that governs their conduct. In any event, *Sanchez* and *Reyes* do not provide relevant guidance here because, in both cases, the court found "fair warning" of clearly established law based on the "general test," irrespective of a developed body of case law putting the matter beyond debate. *Sanchez*, 376 Fed. App'x at *4, n.1 (finding "'fair warning' 'in the general tests' of excessive force and deadly force, and the law was clearly established irrespective of the existence of 'a body of relevant case law.'").

It is truly difficult to comprehend how the court of appeals can say that, as of 2010, the law was of such clarity as to justify forcing Mullenix to trial. The court of appeals panel did not even agree that his conduct was objectively unreasonable. Coupled with this Court's 2004 and 2007 decisions in *Brosseau* and *Scott*, how could a reasonable officer be expected to know in 2010 that it was unconstitutional to use deadly force to stop a fleeing felon from following through on his repeated threats to kill police under these undisputed facts? Even interpreting the court of appeals' holding in this case as birthing such a rule, it certainly was not "clearly established" law in 2010. Hence, it cannot be said that Mullenix "reasonably

misapprehend[ed] the law governing the circumstances [he] confronted." *Brosseau*, 125 S.Ct. at 599.

Further, this Court has never said that officers must exhaust all "non-lethal" means before using deadly force to stop a speeding felon who has repeatedly threatened to kill any officers he encounters during his flight. If the Court is to adopt an exhaustion of "non-lethal" or "alternative" methods requirement, it must say so in terms concrete enough to place officers on clear notice.

A core goal of the qualified immunity doctrine is to ensure law enforcement officials have clear notice that specifically described conduct is constitutionally infirm "beyond debate," or at least in the presence of a persuasive "robust consensus." Not only does Supreme Court law fail to unequivocally proscribe Mullenix's actions, the court of appeals' decision, in view of the other Circuit decisions discussed in the Petition, confound matters. The law presumptively allows for mistaken, but reasonable, beliefs as to the relevant contours of the constitutional right in question. Qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Anderson*, 107 S.Ct. at 3038. And its protection "applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009).

Because there exists no precedent, in this Court or elsewhere, "clearly establishing" a felon's right to be free from deadly force used in an attempt to stop his flight – under the material and uncontroverted facts Mullenix faced – qualified immunity protects Mullenix from trial. The court of appeals' decision does not follow, but undermines, qualified immunity principles. Review is needed to maintain consistency and preserve the doctrine's continued vitality.

PRAYER

Therefore, the amici curiae respectfully urge the Court to grant the Petition for Writ of Certiorari and reverse the court of appeals' judgment.

Respectfully submitted,

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